(20)

No. 84-9-CFX
Status: GRANTED

Title: Massachusetts Mutual Life Insurance Company, et al
Petitioners
v.
Doris Russell

Docketed:
July 5, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Nolan, John E.

Counsel for respondent: Baker, Brad N.

Entry	Date	Note	Proceedings and Orders
1	Jul 5 1984	G	Petition for writ of certiorari filed.
2	Aug 1 1984	G	Motion of American Council of Life Insurance and Healt Insurance, et al. for leave to file a brief as amici curiae filed.
3	Aug 3 1984	G	Motion of Construction Laborers Pension Trust for Southern California, et al. for leave to file a brief amici curiae filed.
4	Aug 3 1984	G	Motion of Alaska Fishermen's Union - Salmon Canners Pension Trust, et al. for leave to file a brief as am curiae filed.
5	Aug 3 1938	G	Motion of Southern California Pipe Trades Trust Funds, et al. for leave to file a brief as amici curiae file
6	Aug 2 1984		Brief of respondent Doris Russell in opposition filed.
7	Aug 3 1984	G	Motion of Board of Trustees of the Carpenters Health & Welfare Trust Fund for California, et al. for leave to file a brief as amici curiae filed.
8	Aug 8 1984		DISTRIBUTED. September 24, 1984
9	Aug 17 1984	X	Reply brief of petitioner MA Mutual Life Ins., et al. file
10	Oct 1 1984		Motion of American Council of Life Insurance and Healt Insurance, GRANTED.
11	Oct 1 1984		Motion of Construction Laborers Pension Trust for Southern GRANTED.
12	Oct 1 1984		Motion of Alaska Fishermen's Union - Salmon Canners Pension Trust, GRANTED.
13	Oct 1 1984		Motion of Southern California Pipe Trades Trust Funds, et al. for leave to file a brief as amici curiae GRANTED.
14	Oct 1 1984		Motion of Board of Trustees of the Carpenters Health & Welfare GRANTED.
15	Oct 1 1984		Petition GRANTED.
			**
16	Nov 13 1984		Brief amicus curiae of 35 Multi-employer Trust Funds filed
17	Nov 14 1984		Brief amicus curiae of Amer. Council of Life Insurance, et al. filed.
18	Nov 14 1984		Brief amicus curiae of Motion Picture Health & Welfare Fur filed.
19	Nov 14 1984		Brief amicus curiae of AK Fishermen's Union, et al. filed.
20	Nov 15 1984		Joint appendix filed.
21	Nov 15 1984		Brief of petitioners MA Mutual Life Ins., et al. filed.
22	Nov 15 1984		Brief amicus curiae of Bd. of Trustees N.CA Carpenter Trus Funds, et al. filed.

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No. 84-9-CFX

Entry	Date	Note	Proceedings and Orders
23	Nov 15 1984		Brief amicus curiae of Southern CA Pipe Trades Trust, et a filed.
24	Dec 4 1984		SET FOR ARGUMENT. Wednesday, January 16, 1985. (3rd case).
25	Dec 7 1984		Record filed.
26	Dec 7 1984		Certified original record, reporter's transcript and C.A. proceedings received. (4 volumes).
27	Dec 10 1984		CIRCULATED.
28	Dec 15 1984	X	Brief amicus curiae of United Steelworkers of America file
29	Dec 21 1984	X	Brief of respondent Doris Russell filed.
30	Jan 9 1985	X	Reply brief of petitioners MA Mutual Life Ins., et al. filed.
31	Jan 16 1985		ARGUED.

No. 84-9

In The

Supreme Court of the United States

October Term, 1983

Massachusetts Mutual Life Insurance Company, and Cecilia Stevenson,

Petitioners,

v.

Doris Russell,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of benefit claims?

PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company *

Cecilia Stevenson

Doris Russell

* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

MML Blend Investment Company, Inc.
MML Equity Investment Company, Inc.
MML Managed Bond Investment Company, Inc.
MML Money Market Investment Company, Inc.
MML Bay State Life Insurance Company
MassMutual Corporate Investors Inc.
MassMutual Income Investors Inc.
MassMutual Mortgage and Realty Investors
MassMutual Liquid Assets Trust
Maslif One & Co.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ———

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Massachusetts Mutual Life Insurance Company, and Cecilia Stevenson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 16, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983), and appears in the Appendix at 1a to 25a. The order of the United States District Court for the Central District of California granting petitioners' motion for summary judgment, as well as the findings of fact and conclusions of law issued in con-

nection therewith, are unreported and appear in the Appendix at 26a to 32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 16, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on April 6, 1984. Appendix ("App.") at 34a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves sections 409, 501, 502, and 503 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1109, 1131, 1132, and 1133 (1982), and 29 C.F.R. § 2560.503-1 (1983) promulgated under ERISA section 503. These provisions are reproduced in the Appendix at 35a to 48a.

STATEMENT OF THE CASE

Petitioner, Massachusetts Mutual Life Insurance Company ("Mass Mutual"), sponsors two ERISA-covered employee benefit plans which provide disability benefits to eligible employees. The Employee Salary Continuance Plan is a sick pay plan which provides short-term salary continuation payments for employees. The Employee Disability Plan provides long-term disability benefits to totally disabled employees who have exhausted their Salary Continuance Plan benefits. Both plans are provided at no cost to employees and are funded from the general assets of the company.[1]

Respondent, Doris Russell, worked as a group claims examiner in Mass Mutual's Los Angeles office until May, 1979 when she became disabled with a back problem.

[1] Petitioner Cecilia Stevenson, an employee of Mass Mutual, was Respondent's supervisor at the company.

Shortly thereafter, Respondent began receiving benefits under the Employee Salary Continuance Plan. These benefits were discontinued by the plan in October, 1979 upon the recommendation of Mass Mutual's Disability Committee.[2] This recommendation was based on an examination report from an independent orthopedic surgeon which concluded that Russell was not physically disabled from performing her usual occupation and that no permanent disability was anticipated.

Russell was advised both of this decision and her right to appeal to the Plan Administrator by letter dated October 17, 1979. App. at 49a. Thereafter, by letter dated October 22, 1979 to the Director of Group Claims rather than the Plan Administrator, Russell requested additional information regarding the termination of her benefits and an application for long-term disability benefits. App. at 50a. She also indicated that she would appeal the termination and submit additional medical evidence confirming her disability. *Id.* Such additional evidence was presented to the Plan Administrator in a letter dated November 27, 1979, and included a report from Russell's psychiatrist which indicated that she was suffering from a psychosomatic disability with physical manifestations rather than an orthopedic disability. App. at 54a.

Russell's November 27, 1979 letter was treated as a formal appeal and referred to the Disability Committee. Thereafter, at the Disability Committee's request, Russell was examined by an independent psychiatrist, who confirmed Russell's temporary psychiatric disability in a report dated February 15, 1980. Based on this report, the Disability Committee recommended that Russell's dis-

[2] The Disability Committee is composed of Mass Mutual's Chief Medical Officer, and four other employees of the company. These employees are appointed by the Chief Executive Officer and receive no special compensation for serving on the Committee, above their normal salary.

ability benefits be reinstated retroactively, which recommendation was adopted. Russell was notified of this decision by letter dated March 11, 1980, App. at 56a, and payment of all benefits due her was made two days later. App. at 57a-58a. In addition, Russell subsequently submitted an application for long-term disability benefits which was approved.[3]

Despite the award of all plan benefits to which she was entitled, Russell brought this action against Petitioners on December 9, 1980 in California Superior Court. Her complaint, which purportedly was predicated on state law, alleged several causes of action arising from her initial suspension of benefits, including breach of a duty of good faith and fair dealing, breach of fiduciary duty, and intentional and negligent infliction of emotional distress.[4] As relief, Russell sought compensatory damages for economic losses and mental anguish and an award of punitive damages.[5]

Following removal of the action,[6] the United States District Court for the Central District of California granted Petitioners' motion for summary judgment. The court first held that ERISA preempted all state law causes of actions relating to the processing of Russell's

[3] In contrast, Russell submitted a claim to the Social Security Administration for disability benefits which was denied.

[4] Russell's complaint also included a claim for wrongful discharge under state law which is not involved in this petition.

[5] Among other things, Russell alleged that the suspension of benefits forced her husband, who also was disabled and without income, to cash out his retirement savings plan in December, 1979. Further, Russell contended that her preexisting psychosomatic illness was aggravated as a result of the alleged improper and untimely processing of her benefit claim, and sought damages for mental and emotional distress.

[6] Petitioners removed this action pursuant to 28 U.S.C. § 1441(a) (1982), alleging the existence of federal jurisdiction under 29 U.S.C. § 1132(e)(1) (1982) and 28 U.S.C. § 1331(a) (1982).

claim for disability benefits. App. at 29a-30a. It then concluded that, as a matter of law, punitive damages and extra-contractual compensatory damages were not available under ERISA. App. at 30a. The court thus accepted, *sub silentio*, Petitioners' contention that, in the benefits claim context, ERISA extends a plan participant a cause of action solely for recovery of benefits due under a plan, which benefits Russell had been paid in full. Finally, the court rejected Russell's argument, raised for the first time in opposition to Petitioners' motion, that Petitioners had violated ERISA by failing to process her appeal within 120 days, as required by regulations promulgated under ERISA section 503, 29 U.S.C. § 1133. *See* 29 C.F.R. § 2560.503-1(h) (1983). App. at 30a. In this regard, the court accepted Petitioners' contentions that Russell's appeal began upon receipt of her November 27, 1979 letter, and that Petitioners' disposition of that appeal on March 11, 1980 was well within the 120-day time limit. *Id.*

The Ninth Circuit affirmed the district court's ruling that Russell's state law causes of action were preempted by ERISA. App. at 8a. It held, however, that Russell had stated a cause of action under ERISA for breach of fiduciary duty, based on the alleged improper or untimely handling of her appeal. App. at 10a. In this regard, the Court of Appeals peremptorily rejected the district court's finding that the Plan Administrator had processed her appeal in a timely manner, determining that Russell's appeal had commenced with her initial letter of October 22, 1979, and that the final determination, accordingly, was rendered at least twelve days beyond the 120-day limit. App. at 11a-12a. The Court went on to hold that such a cause of action could support an award of both extra-contractual compensatory relief, including damages for mental or emotional distress, and punitive damages, reversing the district court's conclusion that such relief was unavailable under ERISA in the benefit claims context. App. at 13a-18a. In so holding, the Court relied upon

language in ERISA section 409 which subjects errant fiduciaries to, among other things, "such other equitable or remedial relief as the court may deem appropriate." App. at 13a, 16a. In the Court's view, such language was broad enough to encompass both punitive and compensatory damages notwithstanding that: (a) section 409 by its terms authorizes recovery *only* on behalf of a plan and *not* on behalf of individual plan participants; (b) punitive damages traditionally have been viewed as neither remedial nor equitable forms of relief; and (c) Congress expressly provided a cause of action to plan participants and beneficiaries in the benefit claims context limited to the recovery of plan benefits and the enforcement and clarification of their rights under the plan, ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1982).[7] It therefore remanded the case to the district court for further proceedings.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Punitive Damages Ruling Conflicts with Decisions of the Eighth Circuit and Numerous District Courts

Review of the lower court's ruling on punitive damages is essential to resolve a conflict both between the Ninth and Eighth Circuits and among the district courts. That the Ninth Circuit has authorized an award of punitive damages under ERISA is plain both from *Russell* and its subsequent decision in *Winterrowd v. Freedman & Co.*, 724 F.2d 823 (9th Cir. 1984), affirming an ERISA award of punitive damages against a contributing employer to a multiemployer plan. The Ninth Circuit's holding, however, squarely conflicts with the reasoning of

[7] The other causes of action extended to participants and beneficiaries under ERISA § 502 likewise make no mention of punitive or compensatory damages, but instead are limited to non-legal forms of relief. *See* ERISA § 502(a)(1)(A), (a)(3), (a)(4), 29 U.S.C. § 1132(a)(1)(A), (a)(3), (a)(4) (1982).

the Eighth Circuit in *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981), in which the Court stated:

> We do not think punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts.

653 F.2d at 1216 (dictum); *see also Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984) (punitive damages not available in action for plan benefits under ERISA section 502(a)(1)(B)). This reasoning has been followed by district courts both in the Eighth Circuit and elsewhere. *See, e.g., Meyer v. Phillip Morris, Inc.*, 575 F. Supp. 1232 (E.D. Mo. 1983) (punitive damages not available against fiduciary for violation of section 104(b)(1) & (3)); *Hechenberger v. Western Electric Co.*, 570 F. Supp. 820 (E.D. Mo. 1983) (punitive damages not available under ERISA); *Meyer v. Phillip Morris, Inc.*, 569 F. Supp. 1510 (E.D. Mo. 1983) (punitive damages not available for violation of section 104(b)(3) & (4)); *Maxfield v. Central States Health, Welfare & Pension Funds*, 559 F. Supp. 158 (N.D. Ill. 1982) (punitive damages not available under ERISA).

Other district courts across the country likewise are sharply divided on the availability of punitive damages under ERISA as well as the legal rationale therefor. *Compare Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980) (punitive damages available against fiduciary under section 409); *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677 (C.D. Cal. 1982) (same); *Bobo v. 1950 Pension Plan*, 548 F. Supp. 623 (W.D.N.Y. 1982) (same); *Free v. Gilbert Hodgman, Inc.*, 3 Empl. Ben. Cas. (BNA) 1010 (N.D. Ill. 1982) (same); *and Bittner v. Sadoff & Rudoy Industries*, 490 F. Supp. 534 (E.D. Wis. 1980) (punitive damages available for violation of section 440),

with Zittrouer v. UARCO, 582 F. Supp. 1471 (N.D. Ga. 1984) (punitive damages not available under ERISA); *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745 (N.D. Ga. 1983) (punitive damages not available against fiduciary under section 409); *Diano v. Central States Health, Welfare & Pension Funds*, 551 F. Supp. 861 (N.D. Ohio 1982) (punitive damages not available under ERISA); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979) (same); *Hurn v. Retirement Fund Trust of Plumbing Industry*, 424 F. Supp. 80 (C.D. Cal. 1976) (same); *UAW v. Federal Forge, Inc.*, No. G83-330 (W.D. Mich. Apr. 5, 1984) (same); *Heine v. Clark Equipment Co.*, No. 82-C-1286 (N.D. Ill. Dec. 21, 1983) (same); *Scheirer v. NMU Pension & Welfare Plan*, No. 82 Civ. 5544 (S.D.N.Y. Sept. 15, 1983) (same); *Jackson v. Occidental Life Insurance Co.*, No. C-80-4288 SW (N.D. Cal. Mar. 2, 1981) (same); *Ziskind v. Retail Clerks International Association*, 3 Empl. Ben. Cas. (BNA) 1012 (E.D. Cal. 1982) (punitive damages not available against fiduciary under section 409); *Rogers v. Northern California Retail Clerks Trust Fund*, No. C-77-1904 (N.D. Cal. June 8, 1978) (punitive damages not available under ERISA); *and Bell v. Southern Oregon Log Scaling Bureau*, 1 Empl. Ben. Cas. (BNA) 1439 (D. Or. 1976) (same). *See also Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084 (W.D. Pa. 1983) (court implied punitive damages allowable against fiduciary under ERISA). The confusion created by these rulings, which already has affected employee benefit plans and their fiduciaries across the country, provides sufficient grounds for reviewing the lower court's decision.

II. The Decision Below Is Inconsistent with ERISA's Plain Language and Legislative History, Prior Rulings of this Court and Decisions Interpreting Analogous Statutes

The Ninth Circuit's ruling not only has exacerbated the confusion existing in the lower courts, but also rests

on a fundamental misconstruction of ERISA. Even a cursory review of ERISA demonstrates that section 409 by its terms authorizes recovery of appropriate equitable and remedial relief *solely* on behalf of the plan itself, and not on behalf of individual participants.[8] This fact is confirmed, moreover, by ERISA's legislative history which repeatedly emphasizes that any recovery under section 409 necessarily inures to the benefit of the plan as a whole. *See, e.g.*, H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 320 (1974) (fiduciary personally liable for losses sustained by plan that result from violation of rules); S. Rep. No. 127, 93d Cong., 1st Sess. 33 (1973) (fiduciary personally liable to reimburse fund for losses resulting from breach and to pay over personal profit realized through use of fund assets); *see also Zink v. Heiser*, 109 Misc. 2d 354, 438 N.Y.S.2d 209 (Sup. Ct. 1981) (recovery against fiduciary under section 409 available only to plan and not to participants or beneficiaries).[9]

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[8] Section 409(a) provides in pertinent part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good *to such plan* any losses to the plan resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject *to such other* equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (1982) (emphasis added).

[9] That § 409 provides recovery only on behalf of the plan itself is further evident from § 502(a)(2), the ERISA civil enforcement provision which sets forth the statutory basis for bringing suit against fiduciaries. That section authorizes four categories of individuals to seek relief under § 409: (1) the Secretary of Labor; (2) participants; (3) beneficiaries; or (4) other fiduciaries. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1982). The common interest shared by these parties is to protect the financial soundness and integrity of the plan as a whole, and not to redress particular individualized injury suffered by a single participant or beneficiary. Such matters must be resolved by recourse to the other provisions of § 502.

In sharp contrast, Congress specifically extended participants and beneficiaries a cause of action in ERISA section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) (1982), to recover any plan benefits due them as well as to enforce or clarify their rights under a plan. Thus, contrary to the Ninth Circuit's ruling, neither ERISA's plain language, nor its legislative history, supports the proposition that a fiduciary may be held personally liable for damages to an individual under section 409, much less, for punitive damages.

Moreover, in concluding that punitive damages are encompassed within the "equitable or remedial relief" authorized by section 409, the Court of Appeals ignored this Court's prior rulings that statutory provisions aimed at providing remedial relief do not allow for such awards. *See, e.g., International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 52 (1979); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940). As the Court observed in *International Brotherhood of Electrical Workers v. Foust, supra*, punitive damages by their very nature are not remedial, but rather are "private fines levied . . . to punish reprehensible conduct and to deter its future occurrence." 442 U.S. at 48 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).[10] Accordingly, statutory provisions, like section 409, which refer solely to equitable and remedial relief, cannot support an award of punitive damages.[11]

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[10] Indeed, despite its ruling, the Ninth Circuit recognized as much:

> The primary role of punitive damages is not to compensate the victim . . . , but to punish the wrongdoer and deter others from similar misconduct.

App. at 16a.

[11] The types of remedies imposed by courts under § 409 have included removal of the fiduciary, *see* Marshall v. Snyder, 430 F. Supp. 1224, 1233 (E.D.N.Y. 1977), *aff'd in part and remanded in part*, 572 F.2d 894 (2d Cir. 1978), appointment of independent managers to invest the plan's assets, *see* Donovan v. Mazzola, 2 Empl. Ben. Cas. (BNA) 2115, 2138 (N.D. Cal. 1981), injunctions against, and rescission of transactions violative of the statute, *see* Eaves v. Penn, 587 F.2d 453, 463 (10th Cir. 1978); Gilliam v. Edwards, 492 F. Supp. 1255 (D.N.J. 1980), and prohibitions against future transactions between employee benefit plans and fiduciaries found guilty of misconduct, *see* Marshall v. Carroll, 2 Empl. Ben. Cas. (BNA) 2491, 2500 (N.D. Cal. 1980).

In much the same vein, the Ninth Circuit's holding disregards the principle, firmly rooted in American jurisprudence, that punitive damages are *not* an equitable remedy, but a traditional form of *legal* relief offered only in courts of law. *See Curtis v. Loether*, 415 U.S. 189, 196 (1974); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982); *Richardson v. Jones*, 551 F.2d 918, 927 (3d Cir. 1977); *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1152 (10th Cir. 1976). That the remedies contemplated by section 409 and, indeed, ERISA as a whole are essentially equitable in nature is apparent not only from the statute's express language,[12] but also from ERISA's legislative history. That history evidences Congress' intent to construe ERISA in accordance with the law of trusts, *see* S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973); *Donovan v. Bierwith*, 680 F.2d 263, 271 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982), an area generally considered to be within the exclusive province of equity courts, *see* 3 A.W. Scott, *The Law of Trusts* § 197, at 1625 (3d ed. 1967); Restatement (Second) of Trusts 2d § 197 (1959). Indeed, based upon the characterization of ERISA's remedies as distinctly equitable, the courts have concluded with near universality that a jury trial is *not* available to participants

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[12] For example, under the civil enforcement provisions of ERISA, participants may sue alternatively "to recover benefits," to "enforce" or "clarify" rights under the plan, to redress breaches of fiduciary duty on behalf of the plan, to "enjoin" any act or practice which violates either ERISA or the terms of the plan or "to obtain other appropriate equitable relief." ERISA §§ 409(a), 502(a)(1)(B), (a)(2), (a)(3); 29 U.S.C. §§ 1109(a), 1132(a)(1)(B), (a)(2), (a)(3) (1982).

seeking relief under the statute. *See, e.g., Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Chastain v. Delta Air Lines, Inc.*, 496 F. Supp. 979 (N.D. Ga. 1980); *Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd mem.*, 662 F.2d 575 (2d Cir. 1980).

Finally, the Ninth Circuit's ruling is inconsistent with decisions interpreting analogous federal statutes which routinely have barred awards of punitive damages. Courts construing Title VII of the Civil Rights Act of 1964,[13] the Age Discrimination in Employment Act,[14] and the Labor Management Relations Act,[15] which are similar in both purpose and structure to ERISA, have concluded that punitive damages are not authorized by these statutes. A dispositive decision by this Court is necessary then both to reconcile the conflict presented by these decisions and to provide practical guidance to lower courts faced with application of these statutes.

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[13] *See, e.g.*, Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982); Shah v. Mt. Zion Hospital & Medical Center, 642 F.2d 268 (9th Cir. 1981); DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980); Harrington v. Vandalia-Butler Board of Education, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977); Pearson v. Western Electric Co., 542 F.2d 1150 (10th Cir. 1976).

[14] *See, e.g.*, Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir.), *cert. denied*, 439 U.S. 1039 (1982); Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir. 1978); Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

[15] *See, e.g.*, Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964) (punitive damages not available under § 303 of LMRA); Williams v. Pacific Maritime Ass'n, 421 F.2d 1287 (9th Cir. 1970) (punitive damages not available under § 301 of LMRA); Local 127, United Shoe Workers v. Brooks Shoe Manufacturing Co., 298 F.2d 277 (3d Cir. 1962) (same).

III. The Ninth Circuit's Decision to Imply a Punitive Damages Remedy as an Addition to the Specific Remedies Set Forth in ERISA Contravenes the Teachings of this Court

The Ninth Circuit's approval of punitive damage awards under ERISA contravenes this Court's general proscription against implying additional remedies where specific limited relief is provided by statute. *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). ERISA contains unusually detailed and particularized enforcement provisions which do not provide for an award of punitive damages. Besides the many remedies noted earlier, participants and beneficiaries may file suit to enforce the disclosure and reporting provisions of the Act, and, in appropriate cases, courts may assess a penalty of $100 a day against administrators who fail to comply with a proper request for information. *See* ERISA section 502(a)(1)(A), (a)(4), (c), 29 U.S.C. § 1132 (a)(1)(A), (a)(4), (c) (1982). Similarly, ERISA provides for an award of reasonable attorneys' fees and costs to participants, beneficiaries or fiduciaries in instances where the court determines that such fees are warranted. ERISA section 502(g)(1), 29 U.S.C. § 1132 (g)(1). Finally, the Act provides criminal penalties for willful violations of ERISA's reporting and disclosure provisions under which imprisonment and fines up to $100,000 may be imposed. ERISA section 501, 29 U.S.C. § 1131 (1982). In view of these elaborate enforcement provisions, it is highly improbable that Congress intended to authorize by implication additional punitive damage awards against fiduciaries. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453

U.S. at 14; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 20.[16]

IV. The Question Presented by this Petition Holds Important Implications for Employee Benefit Plans and the Federal Courts

Unless reversed, the Ninth Circuit's punitive damages ruling will have significant and adverse implications both for the proper administration of employee benefit plans and the federal courts. The Department of Labor's most recent studies indicate that in the United States there are approximately 500,000 private pension plans, which alone cover over 50 million individuals, as well as an estimated 1.7 million sponsors of private employee welfare benefit plans. *See* U.S. Dep't of Labor, Labor Management Services Admin., Pension and Welfare Benefits Programs, Estimates of Participant and Financial Characteristics of Private Pension Plans at 1 (1983); 4 Health and Population Study Center, Battelle Human Affairs Research Centers, Employee Welfare Benefit

[16] Indeed, where Congress has desired to allow for punitive relief, it has not hesitated to do so. At least 14 federal statutes expressly provide for an award of punitive damages in appropriate cases. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978 § 1117(a), 12 U.S.C. § 3417(a) (1982); Securities Exchange Act of 1934 § 21, 15 U.S.C. § 78u(h) (1982); Jewelers' Liability Act § 5(c), 15 U.S.C. § 298(c) (1982); Consumer Credit Protection Act §§ 616, 706, 15 U.S.C. §§ 1681n, 1691e(b) (1982); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520 (1982); Tax Equity and Fiscal Responsibility Act of 1982 § 357(a)(c), 26 U.S.C. § 7431(c) (1982); Deepwater Port Act of 1974 § 15(c), 33 U.S.C. § 1514(c) (1982); Civil Rights Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1976); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 107(c)(3), 42 U.S.C. § 9607(c)(3) (Supp. V 1981); Railroad Revitalization and Regulatory Reform Act of 1976 § 511(j), 45 U.S.C. § 831(j) (1982); Natural Gas Pipeline Safety Act of 1968 § 12(a), 49 U.S.C. § 1679b(a) (Supp. V 1981); Transportation Safety Act of 1974 § 111(a), 49 U.S.C. § 1810(a) (1976); Pipeline Safety Act of 1979 § 209(a), 49 U.S.C. § 2008(a) (Supp. V 1981); and Foreign Intelligence Surveillance Act of 1978 § 110, 50 U.S.C. § 1810 (Supp. V 1981).

Plans and Plan Sponsors in the Private Nonfarm Sector in the United States, 1978-79 at 24 (1980). Administrators and other fiduciaries to these plans process literally millions of claims for disability, pension and health benefits on a yearly basis. The Ninth Circuit's decision, thus, can be expected to have widespread impact on the conduct of plan fiduciaries across the country. Moreover, this impact likely will have deleterious consequences which far outweigh any marginal benefit which might be achieved by permitting punitive damages awards.

As an initial matter, the threat of personal liability for punitive damages could well disrupt the reasoned decisionmaking on the part of plan fiduciaries which Congress considered so essential to ERISA. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 51-52. Faced with the spectre of punitive awards of "unforeseeable magnitude," fiduciaries may feel compelled to process unjustified claims or to settle suits for benefits which they would resist under ordinary circumstances. *Id.* at 52. Thus, far from detering fiduciaries from violating their ERISA responsibilities, an award of punitive damages could well force them to transgress the very principles of prudence and reasonableness which ERISA obligates them to observe, to the financial detriment of the plan as a whole. *See* ERISA section 404, 29 U.S.C. § 1104 (1982). Moreover, the possibility of such unpredictable personal liability will deter many qualified individuals from serving as fiduciaries to employee benefit plans, particularly since insurance against punitive damage awards is unavailable in many jurisdictions.[17]

[17] ERISA expressly prohibits individuals who are employed by a participating employer, association of employers or employee organization from receiving any compensation from the plan for their additional service as plan fiduciaries. *See* ERISA § 408(c)(2), 29 U.S.C. § 1108(c)(2) (1982). As a result, many individuals receive no compensation for serving as plan fiduciaries beyond their normal salaries. Moreover, as noted above, these individuals often cannot be insured against the risk of punitive damage awards and, accordingly, would be forced to pay such awards out of their personal

Similarly, the availability of punitive damages in the benefit claims context will frustrate the orderly internal resolution of benefit claims disputes. Under ERISA section 503 and regulations promulgated thereunder, employee benefit plans are obligated to establish a reasonable claims procedure which provides for full, fair and prompt internal review of any claims initially denied by a plan. ERISA section 503, 29 U.S.C. § 1133 (1982); 29 C.F.R. § 2560.503-1 (1981). The obvious intent of this requirement is to afford both plan participants and plans alike a quick, effective and largely informal means of resolving their differences, thereby avoiding lengthy and expensive litigation. If participants may resort to litigation despite the proper functioning of these review procedures, and, indeed, obtain an award of punitive damages based on initial decisions which are later remedied, this goal will be effectively negated.

Not only will the prospect of internal resolution of disputes be sharply diminished, but the proliferation of litigation which will result from the Ninth Circuit's ruling will be substantial. Lured by the prospect of large punitive damage awards, or, at the least, the prospect of extracting a favorable settlement from fiduciaries, disgruntled participants and beneficiaries will be encouraged to litigate even the most frivolous of claims. The costs of defending the resulting flood of unnecessary litigation will be felt most, not by errant fiduciaries, but by the plans, and ultimately their participants and beneficiaries, in contravention of Congress' goal of minimizing costs and protecting the fiscal integrity of employee benefit plans. *See* ERISA section 2(a), 29 U.S.C. § 1001(a) (1982).

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resources. *See* Flaskamp & Jamar, *Insurability of Punitive Damages—Effect on Strategies and Tactics of Counsel*, in ABA, Extracontractual Damages at 121, 124 (1983). Faced with the prospect of such heavy financial penalties, with virtually no commensurate benefits, many competent individuals will have no incentive to serve as fiduciaries to employee benefit plans.

Moreover, the Ninth Circuit's decision will have the necessary effect of unleashing this torrent of litigation in the federal courts. Under ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1) (1982), the state and federal courts share concurrent jurisdiction over benefit claims actions brought by participants and beneficiaries under section 502(a)(1)(B). All other ERISA actions, including section 502(a)(2) actions for appropriate relief under section 409—the statutory predicate for punitive damages established by the Ninth Circuit—are committed by section 502(e)(1) to the *exclusive* jurisdiction of the federal courts. Because punitive damages may not be awarded under section 502(a)(1)(B), *see Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984), the inevitable consequence of the Ninth Circuit's decision will be the joinder of a claim for punitive damages under section 409 in even the most mundane benefit claims case, thereby insuring that all such actions will be litigated in the federal courts. This displacement of state court jurisdiction not only is contrary to Congress' design in fashioning ERISA's enforcement and jurisdictional provisions, but also will further tax limited federal judicial resources which might be used more efficiently in other matters.

When viewed in this context, the advisability of punitive awards pales considerably. Such awards, of course, serve no compensatory purpose, but represent mere windfalls to prevailing plaintiffs. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 50; *Smith v. Wade*, 103 S. Ct. 1625, 1641 (1983) (Rehnquist, J., dissenting). Moreover, these awards historically have rested on standards which are both ill-defined and unevenly applied, *see Smith v. Wade*, 103 S. Ct. at 1642 (Rehnquist, J., dissenting), and often are assessed in "wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert*

Welch, Inc., 418 U.S. 323, 350 (1974).[18] The benefits served by inflicting this risk on individual fiduciaries, whose administration of employee benefit plans already is subject to a full panoply of statutory and regulatory provisions, including criminal penalties, simply are too insubstantial to justify the severe disruption of orderly employee benefit plan administration that inevitably will follow.

V. For the Same Reasons, the Court Should Review the Ninth Circuit's Holding on Extra-Contractual Damages

If the Court determines that review of the Ninth Circuit's punitive damage holding is appropriate, it likewise should review the lower court's conclusion that section 409 of ERISA authorizes an award of extra-contractual compensatory damages in the benefits claims context. As in the case of punitive damages, the Ninth Circuit's ruling on this issue squarely contradicts the plain language of section 409 which authorizes relief only on behalf of the plan itself, and not on behalf of plan participants or beneficiaries. Moreover, it conflicts in principle with the holdings of other courts that extra-contractual relief, such as damages for mental anguish, are not available under ERISA. *See, e.g., Bittner v. Sadoff & Rudoy Industries,*

[18] For just these reasons, any imposition of punitive damages raises grave due process concerns. As Justice Rehnquist has noted:

> [A]lthough punitive damages are "quasicriminal," their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors . . . . [and] "may be employed to punish unpopular defendants."

Smith v. Wade, 103 S. Ct. at 1641 (citations omitted) (quoting International Brotherhood of Electrical Workers v. Foust, 442 U.S. at 50-51 n.14); *see also* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 Va. L. Rev. 269 (1983).

728 F.2d 820 (7th Cir. 1984) (damages for pain and suffering not available under ERISA section 502(a)(1)(B)); *Hurn v. Retirement Fund Trust of Plumbing Industry*, 424 F. Supp. 80 (C.D. Cal. 1976) (damages for emotional distress not available under ERISA). Finally, the Ninth Circuit's ruling on this issue carries with it many of the same deleterious consequences for plan administration described in connection with punitive damages. In this regard, the same disruption of orderly plan decisionmaking and the same proliferation of litigation in general, and federal court litigation in particular,[19] can be anticipated if the decision below is permitted to stand. Accordingly, just as the availability of punitive damages under ERISA is in need of urgent clarification by this Court, so too should the related issue of extra-contractual damages be conclusively resolved.

[19] As in the case of punitive damages, claims for extra-contractual damages under § 409 cannot be pursued by a participant or beneficiary in a action pursuant to § 502(a)(1)(B), the *only* type of ERISA action that may be brought in state court. Rather, they must be pursued under ERISA § 502(a)(2) over which the federal courts have exclusive jurisdiction. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (1982).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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July 3, 1984

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 81-5879

DORIS RUSSELL,
Plaintiff-Appellant,

v.

MASSASCHUSETTS MUTUAL LIFE INSURANCE COMPANY,
CECILIA STEVENSON,
Defendants-Appellees.

Argued and Submitted May 6, 1982

Decided Dec. 16, 1983

Brad N. Baker, Baker & Burton, Hermosa Beach, Cal., for plaintiff-appellant.

Richard T. Davis, Adams, Duque & Hazeltine, Pasadena, Cal., for defendants-appellees.

Appeal from the United States District Court
for the Central District of California

Before FLETCHER, PREGERSON, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge.

Doris Russell sued in California Superior Court to recover damages allegedly resulting from the termination of her employment with Massachusetts Mutual Life Insurance Company (Mutual). She also sought damages

allegedly resulting from the improper processing of her claim for employee disability benefits. Russell's complaint asserted several causes of action based on Mutual's handling of her disability benefits, including claims for breach of the statutory covenant of good faith and fair dealing under Cal. Ins. Code § 790.03(h)(5) (West Supp. 1982),[1] and breach of fiduciary duty. Russell also asserted a claim for breach of her employment contract and of the implied contractual covenant of good faith and fair dealing. Finally, she alleged the intentional and negligent infliction of emotional distress in connection with both the handling of her disability benefits and the termination of her employment. The relief sought by Russell included both compensatory and punitive damages.

Mutual removed the action to federal district court, alleging that Russell's disability causes of action relating to her benefits were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*[2] Mutual then moved for summary judgment as to all claims. Russell opposed the motion, contending that the state causes of action relating to her disability payments were not preempted by ERISA. She also argued that if ERISA preemption applied, her causes of action could be brought under ERISA, and that compensatory and punitive damages were available under that statute. She contended that compensatory damages were not limited to any claimed loss of benefits. Russell maintained that material questions of fact existed both as to the claims based on the disability payments and those related to the termination of her employment. Fi-

[1] § 790.03(h)(5) prohibits, as an unfair and deceptive practice in the business of insurance, a failure to attempt "in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."

[2] Both parties acknowledge that the plan under which Russell seeks benefits is an ERISA regulated plan. *See* 29 U.S.C. §§ 1002, 1003.

nally, she urged that her claims for the infliction of emotional distress were not preempted under either ERISA or the California Workers' Compensation statute. Cal. Lab. Code §§ 3600-3601 (West Supp. 1982). Russell also expressed a desire to amend her complaint to add causes of action under 29 U.S.C. § 1132(c) (1976) and 29 C.F.R. § 2560.503-1(h) (1981), alleging that her disability claim had not been reviewed in a timely manner.[3]

The district court granted summary judgment in favor of Mutual as to all claims.[4] In determining that Russell

[3] 29 U.S.C. § 1132(c) requires a plan administrator to comply with a request by a participant for certain information within 30 days of such request. 29 C.F.R. § 2560.503-1(h) requires a fiduciary to "promptly" render a decision on a claim for benefits, setting a 60 day limit or, under special circumstances, 120 days from the plan's receipt of the request for review in which to render its decision.

[4] Because no motion or other objection to removal was ever made by any party, we need not consider the question that would otherwise be presented here: whether this case was properly removed pursuant to 28 U.S.C. § 1441. The rule governing an appellate court's inquiry subsequent to removal was stated by an unanimous Court in *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972): ". . . [w]here after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." While we acknowledge that *Grubbs* differs from the case before us because there the state court's original exercise of jurisdiction was proper, that distinction is not controlling; the principle announced by the Supreme Court in *Grubbs*, applies regardless of whether the state court had jurisdiction over the matter when it was originally filed. The *Grubbs* rule has been specifically adopted by this circuit in cases where the merits are reached and determined on a motion for summary judgment. *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980) (citing cases). *See also Lockwood Corp. v. Black*, 669 F.2d 324 (5th Cir. 1982). Because we hold *infra* that appellant stated a valid cause of action under ERISA, the district court would have had original jurisdiction over appellant's claim had it originally been filed in that court.

was not entitled to relief, the court ruled, as a matter of law, that ERISA governed Russell's claims relating to the benefit plan and preempted all state actions relating to those claims. In addition, the court concluded (1) that Russell's claim for extracontractual damages and punitive damages arising out of the denial of her disability claim was barred under ERISA; (2) that Mutual complied with the provisions for review of ERISA claims pursuant to 29 C.F.R. § 2560.503-1(h) and rendered a timely decision on Russell's appeal; (3) that Mutual did not breach the employment contract of any covenant of good faith and fair dealing in connection with the termination of Russell's employment; and (4) that Cal. Lab. Code §§ 3600-3601 (West Supp. 1982) provided the exclusive remedy for intentional or negligent infliction of emotional distress arising out of the termination of employment.

We agree with the district court that Russell's state law causes of action based on Mutual's handling of her disability claim are preempted by ERISA. We hold, however, that a cause of action exists under ERISA for a breach of fiduciary duty based on an alleged improper or untimely handling of benefit claims. We also hold that ERISA permits the award of compensatory damages proximately caused by such a breach of fiduciary duty and that such damages are not limited to the amount of any benefit loss. We further hold that, in appropriate circumstances, the statute allows the granting of punitive damages. Next we hold that summary judgment was improper both as to Russell's claims regarding the benefits plan and her pendent state claims regarding the termination of her employment. Finally, we reverse the district court's holding that Russell's exclusive remedy for the intentional infliction of emotional distress resulting from her termination of employment is under the California Workers' Compensation statute, Cal. Lab. Code §§ 3600-3601 (1982).

BACKGROUND

Russell was employed by Mutual for 15 years as a group claims examiner in Mutual's Los Angeles office. In May 1979, she took a leave of absence because of a disabling back ailment allegedly caused by stress. Russell submitted a report from her chiropractor, Dr. Allred, in support of her claim for disability benefits under Mutual's Employee Salary Continuance Plan (ESCP), and Mutual started to pay benefits under two plans, the ESCP and the Employee Disability Plan (EDP). The ESCP is funded from the assets of the company and provides disability benefits based upon a percentage of the employee's salary. The EDP provides benefits only if the employee is disabled for at least eight weeks and has exhausted all benefits under ESCP. Neither plan involves an insurance policy. Both plans qualify as benefit plans under ERISA. *See supra* note 2.

In August 1979, Russell's claim for disability was taken before Mutual's Disability Committee, composed of Mutual's chief medical director and four other officers of the company.[5] Noting that Russell had taken leaves of absence in 1967 and 1977 due to psychiatric and psychosomatic illnesses causing back pain, the Committee recommended that an independent medical examination be performed by an orthopedic specialist, Dr. Rosco, to verify Russell's injury. On September 18, 1979, Dr. Rosco examined Russell and concluded that she was not, from an orthopedic standpoint, physically disabled. Based

[5] We note that Russell has claimed, and Mutual does not deny, that Mutual is a fiduciary under ERISA and thus subject to the fiduciary duties and responsibilities imposed by the Act. Under 29 U.S.C. § 1002(21)(A) (1976), a person is a fiduciary to the extent that "(i) he exercises *any* discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan . . . ." (Emphasis added).

solely on this report, the Committee determined that Russell's disability salary benefits should be terminated.

Mutual also decided to fire Russell. Mutual argues that this decision was based on an understanding by Cecilia Stevenson, Russell's supervisor, that Russell was unwilling to relocate to the new group claims department in Hacienda Heights, California. Russell contends that she was never asked directly about her intentions regarding the new office, and that she never stated that she definitely would not relocate. On October 17, 1979, Russell was advised by letter that both her salary continuance benefits and her employment would be terminated.

On October 22, 1979, Russell sent a letter to Mutual requesting an appeal of the decision as to salary continuance benefits. She maintained that her benefits claim should be reviewed on the basis of her entire medical record, psychological as well as physical. The request for appeal was received by the plan administrator, Robert Johnson, sometime between October 25 and October 30, 1979. Mutual requested additional information with respect to Russell's allegations of psychosomatic illness.

Prior to and during this appeal process Russell's husband, Ronald, who worked for a different employer, was also disabled and without salary. Russell contends that, because of the financial duress, she and her husband were forced to cash out his retirement savings plan. The economic loss of lifetime benefits from the retirement plan, Russell argues, is a result of Mutual's wrongful denial of her disability claim.

On November 27, 1979, Russell produced the additional information regarding her appeal, including a report from Russell's psychiatrist, Dr. Ziferstein, who had determined that Russell's back pains were caused by psychological problems. Johnson submitted this new evidence to the Committee for review. The committee then scheduled another independent medical examination of Russell,

this time with Dr. Faerstein, a psychiatrist. Faerstein also concluded that Russell was temporarily disabled because of a psychiatric illness.

Based on this additional information, Russell's employment status and salary continuance benefits were reinstated as of March 11, 1980. Russell has since been paid all salary continuance benefits due and is presently receiving long-term disability benefits under Mutual's disability plan. Russell filed this action to recover damages she claims to have suffered as a direct result of Mutual's alleged untimely and improper handling of her disability claim and its alleged wrongful termination of her employment.

I. ERISA PREEMPTION OF STATE LAW CLAIMS

Recognizing the increasing growth, scope and complexity of private employee benefit plans throughout the United States and the inadequacy of the existing standards governing these plans, Congress determined that it was necessary to enact a comprehensive legislative scheme to remedy the problems and afford security, stability, and uniformity in the area. 29 U.S.C. § 1001(a). To provide for the financial soundness and the fair and equitable administration of such plans, ERISA was enacted in 1974. 29 U.S.C. § 1001(a) (1982).

Our inquiry here is whether Russell's state law causes of action based on Mutual's processing of her disability claim under an ERISA regulated benefit plan are preempted and, if so, whether ERISA provides Russell with an actionable claim against Mutual, as a fiduciary.

The broad statutory language offers considerable guidance as to the preemptive scope of ERISA. Section 1144 provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan* . . . ." 29 U.S.C. § 1144(a) (1982)

(emphasis added).[6] The legislative history of ERISA indicates that the Act was intended as a comprehensive regulatory scheme, with the broad preemptive language of section 1144 intentionally designed to provide complete protection to plan funds and participants by establishing national uniformity in the regulation of employee benefit plans. In short, "[t]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required . . . the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29,942 (1974) (Statement of Senator Javits). *See also* 120 Cong. Rec. 29,933 (1974) (statement of Senator Williams).

Noting the breadth of federal preemption permitted by ERISA, the Supreme Court recently held that a state law "relates to" an employment benefit plan "if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines, Inc.* —— U.S. ——, ——, 103 S.Ct. 2890, 2900 (1983). Since the state laws here involved authorize state causes of action for the improper handling of claims under benefit plans, there is a direct connection between the state laws and the employment benefit plan. *See also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523, 101 S.Ct. 1895, 1906, 68 L.Ed.2d 402 (1981). We therefore hold that Russell's state causes of action relating to her disability claim are preempted.

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[6] ERISA sets forth several specific exceptions to the broad preemptive scope of section 1144(a). Section 1144(b)(2)(A) provides that ERISA does not exempt or relieve "any person from any law of any State which regulates insurance, banking, or securities." ERISA also preserves state regulation of "generally applicable criminal laws of a State." Section 1144(b)(4). Fnally, ERISA does not supersede state regulation in other areas, (e.g. antidiscrimination laws) where the state law is coextensive with federal law, *see Shaw v. Delta Airlines*, —— U.S. ——, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (state employment laws which provide a means to enforce Title VII are not preempted).

II. ERISA CAUSE OF ACTION

ERISA, though preempting Russell's state causes of action, provides a federal cause of action for the breach of certain fiduciary duties by those administering benefit plans. The question, then, is whether Mutual's alleged mishandling of Russell's claim for disability benefits would constitute a breach of fiduciary duty under the Act and, if so, whether it is the type of breach that gives rise to a cause of action by a plan beneficiary.

Section 1132 is the civil enforcement portion of ERISA. Section 1132 provides in relevant part that:

> (a) A civil action may be brought—
>
> . . . .
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under § 409 [29 U.S.C. § 1109];

Section 1109(a) provides in part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate. . . .

Thus a beneficiary or participant may, pursuant to section 1132(a)(2), bring a cause of action under section 1109(a) for the breach by a fiduciary of any responsibility, duty or obligation imposed by the Act, assuming, of course, that the breach causes him some injury.

ERISA is a remedial statute enacted "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts." 29 U.S.C. § 1001(b). The Act imposes a comprehensive scheme of fiduciary duties and responsibilities

for managing and administering plan funds that "provid[e] benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(A)(i). Protection from fiduciary conduct that violates these duties is necessary to implement Congress' express policy of imposing "strict fiduciary obligations upon those who exercise management or control over the assets or *administration* of an employee pension or welfare plan," 3 U.S. Code Cong. & Ad. News at 5177-78 (1974) (emphasis added), and "providing for appropriate remedies and sanctions" for the breach of such duties. 29 U.S.C. § 1001(b).

In light of this explicit congressional policy, we find that ERISA regulates fiduciary conduct not only in the care and management of plan assets, but also in the handling and disposition of claims. It would be unreasonable to conclude that Congress provided a comprehensive fiduciary scheme designed to "occupy the field" with respect to protecting the interests of participants and their beneficiaries under pension and benefit plans without also providing for the fair and proper handling of claims. Moreover, ERISA was intended to serve as a substitute for various existing state protective laws and regulations. *See supra* at 5889, at 487. It would be anomalous if Congress eliminated the protections offered by state law without providing comparable federal protections. We therefore believe that Congress intended to provide a comprehensive scheme of fiduciary responsibilities and duties encompassing both the management of plan assets and the handling and processing of participant's claims and to afford remedies for violation of those responsibilities, obligations and duties.

Under the standard of conduct required by ERISA, a fiduciary must process claims in good faith, and in a fair and diligent manner. A failure to render a decision on a benefit claim "promptly" and within the time periods prescribed by the Secretary of Labor constitutes a breach of duty. *See* 29 U.S.C. § 1135, 29 C.F.R. § 2560.503-1(h).

ERISA sets forth rules governing the handling of claims that must be followed by the fiduciaries of each covered plan. The plan must, in accordance with regulations to be adopted by the Secretary of Labor,

> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133.

Pursuant to section 1135, the Secretary has issued implementing regulations imposing strict obligations on those responsible for the handling of benefit claims. 29 C.F.R. § 2560.503-1(h) requires that a decision be made "promptly," *and* not later than 60 days or, under special circumstances, up to 120 days from "receipt of a request for review." A violation of this obligation would, in our opinion, give rise to a section 1109(a) cause of action by a beneficiary or participant, pursuant to the provisions of section 1132(a)(2).

The record shows that the plan administrator received Russell's "request" for review around October 25, 1979 and acknowledged receipt in a letter to Russell dated October 30. Russell's claim was not resolved until March 11, 1980, at least 132 days after the acknowledged receipt of the request for review. Even assuming that "special circumstances" existed, this exceeds the 120 day limit.

Mutual argues that the time period started when Russell submitted all of the medical information requested by the plan administrator. However, the time period under the provision runs from the time of "receipt of a

request for review," not the time when all information requested has been forwarded. Otherwise the administrator could always extend the statutory deadline by requesting additional information. Moreover, Mutual has not alleged that Russell failed to act reasonably or diligently in forwarding information to the plan administrator.

We do not know whether there are other arguments that Mutual can make in an attempt to show that it did not violate the timeliness requirement, and we need not make a final determination. On remand, the district court should consider the preceding analysis in deciding whether Mutual handled Russell's claim in a timely manner. Moreover, adherence to the specific time requirements is not the only obligation imposed by ERISA in connection with the handling of benefit claims. We also hold that processing claims in a perfunctory or arbitrary manner or in bad faith, or without the exercise of reasonable care, constitutes a breach of fiduciary duty under ERISA, and that such breaches, like a timeliness breach, give rise to a cause of action under the statute.[7] On remand, the district court should further consider here the extent to which Mutual knew or should have known pertinent facts concerning Russell's medical history and whether Mutual should have considered any of those facts before denying her benefit claim; nor need we consider whether Mutual failed in any other way to process

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[7] Although some parts of the standard are identical to those used in breach of the duty of fair representation cases, (*Vaca v. Sipes*, 386 U.S. 171, 192, 87 S.Ct. 903, 918, 17 L.Ed.2d 842 (1967); *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1089-90 (9th Cir. 1978)), we do not suggest that the standard in its entirety should be the same. There are significant differences between the role of a union official who is attempting to decide whether an individual's grievance should be taken to arbitration under a collective bargaining agreement, or who may even be attempting to handle a complex arbitration proceeding himself, and the role of a fiduciary who is required to provide benefits under a pension or disability plan. Accordingly, we believe ERISA may require a stricter standard.

Russell's claims in a manner consistent with its statutory obligations.

III. COMPENSATORY DAMAGES

The district court determined that ERISA precluded extracontractual damages for breach of fiduciary duty under the Act. We disagree. In our view, ERISA allows beneficiaries to sue for compensatory damages proximately caused by a breach of fiduciary duty. Such damages are not limited to the amount of any benefit loss.

We have held, *supra* at p. 488, that under section 1132(a)(2) a participant or beneficiary may institute a section 1109(a) action as the result of a fiduciary's breach of a responsibility, duty or obligation imposed by the statute. Section 1109 provides that a court may award any "equitable or remedial relief as [it] may deem appropriate" against a fiduciary who breaches its duties.[8] The damage provision is extremely broad, and the court is given wide discretion as to the damages to be awarded. It may award any equitable or *remedial* relief it deems appropriate.

We believe it clear that ERISA permits an award of compensatory damages that will remedy the wrong and make the aggrieved individual whole. Such a reading has found nearly unanimous support in recent decisions which hold that section 1109 provides courts with substantial discretion to fashion appropriate relief, including compensatory damages. *Jiminez v. Pioneer Diecasters*, 549 F.Supp. 677, 681 (C.D.Cal. 1982); *Free v. Gilbert Hodgman, Inc.*, 3 Emp.Ben.Cas. (BNA) 1010, 1012 (N.D.Ill. 1982); *Bobo v. 1950 Pension Plan*, 548 F.Supp. 623, 626 (W.D.N.Y. 1982); *Eaton v. D'Amato*, 3 Emp.Ben.Cas. (BNA) at 1007; *Pension Plan and Trust*, 317 Pension

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[8] Liability under § 1109 is against the fiduciary personally, not the plan. However, we note that ERISA does allow for certain forms of fiduciary indemnification under section 1110.

Rep. (BNA) A-13, A-17 (C.D.Cal. 1980); *Bittner v. Sandoff and Rudoy Industries*, 490 F.Supp. 534, 536 (E.D.Wis. 1980). Support for the allowance of compensatory damages is also found in the legislative history of ERISA. *See* H.R.Rep. No. 93-533, 93d Cong., 1st Sess. 17, *reprinted in* 1974 U.S.Code Cong. & Ad.News 4639, 4655; S.Rep. No. 93-127, 93d Cong., 1st Sess. 35, *reprinted in* 1974 U.S.Cong. & Ad.News 4838, 4871.

In referring to compensatory damages necessary to make a party whole, we are not referring merely to contractual damages for loss of plan benefits. Rather, section 1109 provides for relief that will compensate the injured party for all losses and injuries sustained as a direct and proximate cause of the breach of the fiduciary duty. A contrary reading would conflict with the language of the statute and provide little encouragement to fiduciaries to abide by the Act, since the most that could be forfeited in the event of misconduct would be benefits already owed by the plan. More important, a fiduciary could ignore or unreasonably perform its duties and responsibilities with respect to the disposition of claims with virtual impunity and at the sole cost of the participant who has suffered harm as a result of such misconduct. We believe that Congress did not intend to afford such fiduciary immunity. Rather, by giving courts broad discretion to grant relief, Congress intended to provide adequate redress to participants who are injured as a result of a fiduciary's breach of its obligations.

Although we find it unnecessary to fashion a more specific rule on compensatory damages, we add that damages for mental or emotional distress accompanied by some physical manifestation are recoverable under section 1109. Here, Russell contends that her pre-existing back problem, which had been originally caused by psychosomatic illness, was aggravated as a result of the emotional distress caused by the improper and untimely handling of her benefit claim. Thus, we need not consider whether the absence of a physical effect would in any way affect our conclusion. We also hold, however, that ERISA does not give rise to a separate cause of action for negligent or intentional infliction of emotional distress. There is no mention in the statute or the legislative history of any such cause of action, and we do not believe that Congress intended to provide one.

IV. PUNITIVE DAMAGES

The district court also decided that ERISA does not authorize the award of punitive damages for the breach of fiduciary duty under the Act. We reverse and hold that it does, under appropriate circumstances. We note that the question whether punitive damages are authorized by ERISA has provoked much controversy and a split in the published decisions. *Compare Jiminez v. Pioneer Diecasters*, 549 F.Supp. at 680 (punitive damages allowed against fiduciary under section 1109); *Free v. Gilbert Hodgman, Inc.*, 3 Emp. Ben. Cas. (BNA) at 1010, 1012 (punitive damages recoverable against fiduciaries under section 1109); *Short v. Junior Steel Co. Employees Pension Plan and Trust*, 317 Pension Rep. (BNA) at A-17 (punitive damages recoverable against fiduciary under section 1109; *Eaton v. D'Amato* 3 Emp. Ben. Cas. (BNA) 1003, 1007 (punitive damages recoverable against fiduciary under section 1109(a)); *Bittner v. Sadoff & Rudoy Industries*, 490 F.Supp. at 536 (punitive damages not excluded under section 1140 and 1132) *with Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1216 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 and 1084, 102 S.Ct. 512 and 641, 70 L.Ed.2d 384 and 619 (punitive damages not provided for in ERISA (dictum)); *Hoskins v. Retirement Plan of Standard Oil*, 78-C3670 (N.D. Ill. 1962) (punitive damages not recoverable against fiduciary under section 1132(a)(3)(B)); *Hurn v. Retirement Fund Trust*, 424 F.Supp. 80, 82 (C.D. Cal. 1976) (section 1132 does not authorize punitive damages; *Bell v. Southern Oregon Log Scaling and*

Grading Bureau, 130 Pension Rep. (BNA) D-6 (D. Or. 1976) (punitive damages not recoverable against fiduciary under section 1132(a)(3)(B)); *Wardle v. Southeast and Southwest Areas Pension Fund*, No. 77-144-C, 239 Pension Rep. (BNA) D012 (S.D. Ind. 1979) (punitive damages not recoverable under section 1132(a)(3)(B)).

The primary role of punitive damages is not to compensate the victim of intentional wrongdoing, but to punish the wrongdoer and deter others from similar misconduct. Nevertheless, much of what we said earlier in our discussion of compensatory damages is applicable as well to the question whether the Act permits an award of punitive damages, particularly our comments concerning the broad discretion given to the courts under section 1109(a) to fashion appropriate relief.

One of the methods that Congress selected to ensure compliance with the Act was to provide for the imposition of "sanctions" against those violating their fiduciary duties. 29 U.S.C. § 1001(b). Moreover, according to both the Senate and House Committee reports, Congress intended the Act to provide "the full range of legal and equitable remedies available in both state and federal courts." H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 17, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4655, Sen. Rep. No. 93-127, 93d Cong., 1st Sess. 35, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4871. We see no reason for believing that Congress intended to exclude the sanction of punitive damages from this full range of legal and equitable relief. Furthermore, those same two reports tell us that the Act's "enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with *broad remedies for* redressing or *preventing violations* of the Act." H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 17, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4655, Sen. Rep. No. 127, 93d Cong., 1st Sess. 35, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4871

(emphasis added). The availability of punitive damages serves a deterrent or preventive purpose. Violations are less likely to occur if those handling the funds know that they may be subject to heavy financial penalties when their conduct warrants it.

We also reach our conclusion, in part, because of the analysis we applied in resolving an identical question with respect to an analogous statute, the Landrum-Griffin Act, 29 U.S.C. § 412 (1976). We held that the Landrum-Griffith Act authorizes the award of punitive damages in appropriate circumstances because such awards "would serve [as] 'a deterrent to those abuses which Congress sought to prevent.'" *Cooke v. Orange Belt District Council of Painters*, 529 F.2d 815, 820 (9th Cir. 1976) (citation omitted). Landrum-Griffith like ERISA does not specifically mention punitive damages. In the case of Landrum-Griffin we held that the statute authorizes the award of punitive damages even though "the legislative history of the Landrum-Griffin Act is not all that clear (and is probably inconclusive)." *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1305 n. 6 (9th Cir. 1979), *cert. denied*, 449 U.S. 904, 101 S.Ct. 279, 66 L.Ed.2d 136 (1980). We found such damages to be authorized because "it may be said that the overall thrust of the Act was to protect the individual rights of union members and to deter abuse and denial thereof by union officers. The awarding of punitive damages will, in proper cases, serve this purpose." Id. at 1305 n. 6. We think that the reasoning of *Cooke* and *Bise* is equally applicable here.

Although we hold that punitive damages may be awarded for a breach of duty by a plan fiduciary, such awards may be made in only very limited circumstances. These circumstances require a showing that the fiduciary, in carrying out its duties and responsibilities under the Act, acted with actual malice or wanton indifference to the rights of a participant or beneficiary. *See, e.g., Bise*,

618 F.2d at 1505. We intimate no view here as to Russell's right to recover punitive damages based on any specific allegations in her complaint in its present form, or as it may be amended.

V. EMPLOYMENT CONTRACT

Russell contends that she was wrongfully terminated by Mutual because an implied contract existed between the parties, and Mutual violated its duty of good faith and fair dealing by firing Russell without good cause.[9] The district court found that no implied employment contract existed and that there was no lack of good faith and fair dealing. Thus, it granted Mutual's motion for summary judgment. We find that summary judgment as to these issues was inappropriate.

Section 2922 of the California Labor Code provides, in pertinent part, that "employment, having no specified term, may be terminated at the will of either party on notice to the other." Russell concedes that no express or written employment contract existed here. She argues instead that an implied contract existed and thus that Mutual could not discharge her except for good or just cause. In *Pugh v. See's Candies, Inc.*, 116 Cal. App.3d 311, 171 Cal. Rptr. 917 (1981), the California court of appeals held that although no written contract existed, the plaintiff had established a prima facie case of wrongful discharge based on an implied contract of employment. The employer was thus required to show "good cause" for the termination of the plaintiff's employment.

[9] We have pendent jurisdiction over Russell's common law claims for wrongful discharge, breach of implied covenant of good faith and fair dealing and damages. With respect to these claims, Mutual and Russell's immediate supervisor, Stevenson, were named as defendants. However, Russell alleges Stevenson was working within the scope of her employment with Mutual. Hence, for purposes of this apppeal we will refer to the collective defendants as "Mutual."

In making its determination, the court reviewed the totality of the parties' relationship, including "the duration of [plaintiff's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies." *Id.* at 329, 171 Cal. Rptr. 917.[10]

The allegations and affidavit submitted by Russell contend that she was employed by Mutual for 15 years as a claims examiner. Russell had allegedly been one of the top producers in the office for the last eight years and top in sales from 1973-1977. Moreover, she claims that she was commended for her work on several occasions and received no written or formal criticism during the entire course of her employment with Mutual.

The record before us suggests that Mutual's decision to fire Russell was based on Russell's alleged refusal to relocate. However, there is conflicting evidence as to whether Russell ever actually *refused* to relocate or even gave Mutual such an impression.

Where there is any issue of material fact to be tried, summary judgment must be denied. *Hepp v. Lockheed-California Co.*, 86 Cal. App.3d 714, 717, 150 Cal. Rptr. 408 (1978). Under *Pugh*, an implied promise that Mutual would not act arbitrarily with its long-time em-

[10] In *Cleary v. American Airlines, Inc.*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980) the court, focusing on the 18 years of satisfactory employment performed by the plaintiff, stated that termination "of employment without legal cause after such a period of time offends the implied in law covenant of good faith and fair dealing contained in all contracts, including employment contracts." *Id.* at 455, 168 Cal.Rptr. 722. Though the court in *Pugh* did not rest its finding on an implied covenant of good faith and fair dealing, it did consider the duration of satisfactory employment as a factor in determining whether an "employer's conduct gave rise to an implied promise that it would not act arbitrarily" in dealing with its employee. *Pugh v. See's Candies* at 329, 171 Cal.Rptr. 917.

ployee may be "shown by the acts and conduct of the parties, interpreted in light of the subject matter and of the surrounding circumstances." *Pugh v. See's Candies*, 116 Cal. App.3d at 329, 171 Cal. Rptr. 917. Viewing the evidence in a light most favorable to Russell, we find that a material question of fact exists as to whether there was such an implied promise from Mutual to Russel, and, if so, whether there was good cause for the latter's termination. It is for the trier of fact to make these determinations. Hence, summary judgment was inappropriate.

V. CALIFORNIA WORKER'S COMPENSATION LAWS

Russell alleges causes of action for negligent and intentional infliction of emotional distress arising both from Mutual's handling of her claim for disability benefits and from the termination of her employment. The district court found that the claims were preempted—those relating to disability benefits by ERISA and those relating to termination by the California Workers' Compensation Law, Cal. Lab. Code §§ 3600-01 (West 1983).

As to Russell's claims for negligent and intentional infliction of emotional distress arising from the handling of her disability benefits, we affirm. Those claims are preempted by ERISA and there is no parallel federal cause of action under the statute.

The district court correctly held that Russell's claims for negligent infliction of emotional distress arising from the termination of her employment are barred by the California Workers' Compensation Laws. We disagree, however, with the district court's holding that Russell's claims for intentional infliction of emotional distress are similarly barred.

Russell maintains that the claim for intentional infliction of emotional distress arising out of the termina-

tion of her employment is not preempted by the Workers' Compensation laws because the injuries alleged—emotional anguish, anger, humiliation and feelings of betrayal—did not arise out of the course and scope of employment, are non-physical and thus non-compensable under the Act, and are the result of Mutual's intentional tortious acts.

For purposes of workers' compensation preemption, we must first determine whether the injuries alleged arose out of and in the course of Russell's employment relationship with Mutual. *See generally Renteria v. County of Orange*, 82 Cal. App.3d 833, 835, 147 Cal. Rptr. 447 (1978). California's courts have held that an injury in the form of emotional distress caused by termination of employment is within the course and scope of an employment relationship even when the emotional distress occurs subsequent to the date of termination. *Ankeny v. Lockheed Missiles and Space Co.*, 88 Cal. App.3d 531, 534, 151 Cal. Rptr. 828 (1979); *Gates v. Trans Video Corp.*, 93 Cal. App.3d 196, 201-03, 155 Cal. Rtpr. 486 (1979). We thus find that Russell's alleged injuries arose out of and in the course of her employment relationship with Mutual.

However, finding that the activity was within the scope of the employment relationship for purposes of the Workers' Compensation statute does not end our inquiry. For, as Russell correctly points out, mental anguish absent any physical injury is not a compensable injury under California's Workmen's Compensation laws. Thus, she argues, because Workers' Compensation does not provide a remedy for such an injury, she is not precluded from bringing an action for damages. Here, however, Russell claims a physical injury, aggravation of her pre-existing back condition. Therefore, this argument is of no assistance to her. Finally, Russell says, under California law injured persons are afforded the right to institute civil actions for intentional infliction of emo-

tional distress, regardless of whether they are also entitled to proceed under the Workers' Compensation statute. We decide only that she is correct in at least one part of her argument—under California law, tort actions lie for intentional infliction of emotional distress, and such actions are not preempted by the Workers' Compensation statute.

In *Renteria v. County of Orange*, 82 Cal. App.3d 833, 147 Cal. Rptr. 447 (1978) an employee filed an action for intentional and negligent infliction of emotional distress, claiming that he had been tormented and harassed by his employer and fellow employees. The trial court sustained the defendant's demurrer on the ground that the Workers' Compensation Board had exclusive jurisdiction over the matter. The court of appeal reversed, holding that "an employee's cause of action for intentional infliction of emotional distress constitutes an implied exception to the exclusive remedy provisions of Labor Code section 3601." *Id.* at 842, 147 Cal. Rptr. 447. In reaching its holding, the court of appeals emphasized the fact that the deterrent function of the law would not be properly served by limiting recovery to an award under the essentially "no fault" Workers' Compensation system. The court suggested that imposing civil liability for intentional wrongdoing furthers the objective of deterring such acts.

In *Gates v. Trans Video Corp.*, 93 Cal. App.3d 196, 201-203, 155 Cal.Rptr. 486 (1979) (and in *Ankeny v. Lockheed Missiles & Space Company*, 88 Cal. App.3d 531, 534-36, 151 Cal. Rptr. 828 (1979), two cases relied on by Mutual, the California Courts of Appeals held that Workers' Compensation is the exclusive remedy when a plaintiff's injury involves both emotional and physical components, thereby narrowly construing *Renteria* as applicable only to injuries of an exclusively emotional nature that result in no physical manifestations.

Here, Russell alleges not only emotional stress but physical injury in the form of aggravated back problems.[11] Thus, if *Gates* and *Ankeny* accurately reflect the law of California as the state Supreme Court would apply it, Russell's claim for damages for emotional distress would be preempted by the Workers' Compensation statute. We do not believe, however, that the *Gates-Ankeny* reading of *Renteria* is correct, or that it would be adopted by the California Supreme Court.

Two later state appeals court decisions have substantially undermined the *Gates-Ankeny* reading of *Renteria*. In *Lagies v. Copley*, 110 Cal. App.3d 958, 168 Cal. Rptr. 368 (1980), the court of appeals refused to confine *Renteria's* application to cases involving only emotional injury. Instead, taking its lead from pronouncements by the California Supreme Court, it rejected the artificial distinction between physical and psychological injury, citing *Molien v. Kaiser Foundation Hospital*, 27 Cal.3d 916, 616 P.2d 813, 167 Cal.Rptr. 831 (1980). It held *Renteria* applicable, even though the plaintiff alleged "accompanying physical disability," 110 Cal. App.3d at 971, 168 Cal. Rptr. 368.

In *McGee v. McNally*, 119 Cal. App. 3d 895, 174 Cal. Rptr. 253, (1981), another court of appeals, in a decision joined by Justice Grodin, now of the California Supreme Court, also minimized the *Ankeny-Gates* distinction between emotional injury and emotional injury accompanied

[11] Pre-existing physical conditions, such as Russell's psychosomatic disability and accompanying back pains, which are aggravated by activities within the course of employment have been held to be compensable under California's Workers' Compensation statute. The California Supreme Court held that "[a] disability that is in part attributable to a pre-existing disease is nonetheless compensable so long as a worker's employment played *any* contributing role in either *aggravating* the progressive [condition] or in hastening [its] occurrence." *City & County of San Francisco v. Workers' Compensation App. Bd.*, 22 Cal.3d 103, 115, 583 P.2d 151, 148 Cal.Rptr. 626 (1978). (Emphasis added).

by physical effects. The court of appeals in *McGee* restated the *Renteria* holding, verbatim, and adopted the essential reasoning underlying the holding.

Although there is language in *Renteria* and *McGee*, such as the reference to "make weight" injuries, that makes the analysis somewhat less than crystal clear, we think it evident that the *Renteria-McGee* courts were saying in essence that where the primary injury is emotional distress, and that is the gist of the complaint, a cause of action in intentional tort lies, regardless of whether the emotional distress also manifests itself physically in some way or causes some physical disability.

Of equal importance, the court of appeals in *McGee* echoed the policy concern voiced in *Renteria*, that emotional injuries resulting from deliberate wrongdoing must be actionable at civil law—outside the confines of Workers' Compensation—if the deterrent function of the law is to be served. *McGee* pointed to the California Supreme Court's discussion in *Johns-Manville Products Corp. v. Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980), of "a trend toward allowing an action at law for injuries suffered in the employment if the employer acts deliberately for the purpose of injuring the employee . . . ." *McGee*, 119 Cal. App. 3d at 895, 174 Cal. Rptr. 253. *McGee* also stressed the fact that both the majority and dissenting opinions in *Johns-Manville* expressed approval of *Renteria*.

In an effort to strengthen the deterrent function of liability rules, the trend towards increasing the sanctions imposed on wrongdoers is gaining favor in a variety of contexts as courts recognize that compensation of victims is only part of the purpose of tort liability. *See, e.g., Hartford Accident & Indemnity Co. v. Village of Hempstead*, 48 N.Y.2d 218, 228, 397 N.E.2d 737, 744, 422 N.Y.S.2d 47, 53-54 (1979), (New York public policy prohibits insurance coverage of punitive damages awarded against municipal officers under 42 U.S.C. § 1983 to

foster deterrent objective). *See generally*, G. Calabresi, *The Cost of Accidents* 39-40 (1970); Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 Yale L.J. 1 (1980).

It is significant that *McGee*, which substantially undermines the reasoning of *Ankeny* and *Gates*, was decided by the same district court of appeals that decided *Ankeny*. Thus, in only one of California's five appellate districts is there currently a controlling decision that purports to limit the *Renteria* holding. We believe that *Renteria* reflects the law as the California Supreme Court would find it; we restate its holding verbatim, and adopt it here: "An employee's cause of action for intentional infliction of emotional distress constitutes an implied exception to the exclusive remedy provision of Labor Code Section 3601." *Renteria*, 147 Cal. Rptr. at 452. We therefore hold that California's Workers' Compensation laws do not constitute Russell's exclusive remedy for the alleged intentional infliction of emotional distress by her employer.[12]

Affirmed in part; reversed in part; remanded for further proceedings consistent with this opinion. Upon remand, plaintiff should be allowed to amend her complaint to plead such causes of action as may be appropriate in light of this opinion.

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[12] Ordinarily we would give some deference to the district court's judgment as to how the California Supreme Court would interpret the California statute. *See, e.g., Major v. Arizona State Prison*, 642 F.2d 311, 313 (9th Cir. 1981); *United States v. County of Humboldt*, 628 F.2d 549, 551 (9th Cir. 1980). Here, however, we give the district court's conclusions little, if any, weight. The district court cited no cases, California or otherwise, to support its conclusions. Nor did the district court prepare those conclusions itself, a practice we have previously expressed our disapproval of.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-81-116-R

DORIS RUSSELL AND RONALD RUSSELL,
Plaintiffs,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, CECILIA STEVENSON and DOES 1 through 50, inclusive,
Defendants.

Date: August 17, 1981

Time: 10:00 a.m.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Aug. 24, 1981]

The Motion for Summary Judgment of defendants Massachusetts Mutual Life Insurance Company ("Massachusetts Mutual") and Cecilia Stevenson ("Stevenson") came on regularly for hearing on August 17, 1981, before the Honorable Manuel L. Real, United States District Judge. Plaintiff Doris Russell appeared by her attorneys of record, Baker & Burton, by Brad N. Baker, Esq. Massachusetts Mutual and Stevenson appeared by their attorneys of record, Adams, Duque & Hazeltine, Richard T. Davis, Jr., Esq. and David L. Bacon, Esq. The Court, having heard oral argument and having duly considered the memoranda submitted by the parties, the affidavits submitted by Massachusetts Mutual and Stevenson, the deposition of plaintiff, Doris Russell, and all of the records and files herein, to which there is no material issue, now makes its Findings of Fact and Conclusions of Law as follows:

1. Plaintiff was employed by defendant Massachusetts Mutual as a group claims examiner in its Los Angeles office.

2. Massachusetts Mutual has created two employee benefit plans, the "Employee Salary Continuance Plan" and the "Employee Disability Plan," providing disability benefits to certain of its employees. The Salary Continuance Plan is funded from the general assets of the Company and there is no insurance policy, either internally or with a third party, involved whatsoever. Both plans qualify as benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA") and copies of both of the plans were filed with the United States Department of Labor as required by ERISA.

3. In May 1979, plaintiff became ill and unable to work, and has never returned to work. Plaintiff submitted claims for benefits under the Employee Salary Continuance Plan and Massachusetts Mutual commenced paying benefits.

4. On October 17, 1979, based on a report dated September 18, 1979, by Dr. Michael E. Rosco, Massachusetts Mutual determined that plaintiff was not disabled from performing her duties as a claims examiner. Furthermore, based upon reports received from plaintiff's immediate supervisor, Cecilia Stevenson, Massachusetts Mutual had an understanding that plaintiff was unwilling to relocate to the new group claims office in Hacienda Heights. On October 17, 1979, plaintiff was advised in a letter from Charles Dole that her salary continuance benefits were being discontinued and her employment was being terminated.

5. Shortly thereafter, plaintiff wrote to Massachusetts Mutual and advised that she intended to appeal the decisions and that she would submit additional medical evidence. By letter dated November 27, 1979, plaintiff submitted further evidence concerning her disability

status, including a report from Dr. Ziferstein, a psychiatrist, who certified that plaintiff was suffering from a psychiatric disability which manifested itself with pain.

6. Plaintiff's request for review was treated as an ERISA appeal by Robert Allison Johnson, the Plan Administrator. At his request, plaintiff was examined by Dr. Saul Faerstein, a psychiatrist, on January 15, 1980. Dr. Faerstein sent Massachusetts Mutual a report dated February 15, 1980, which concluded that plaintiff was temporarily disabled because of a psychiatric illness.

7. Upon receipt of the report, Mr. Johnson decided to grant plaintiff's ERISA appeal, reinstate her salary continuance benefits and reinstate her employment. By letter dated March 11, 1980, Mr. Johnson advised plaintiff of his decision. On March 13, 1980, Massachusetts Mutual's field representative, Denis Hunady, personally deferred payment of all accrued benefits to plaintiff's then attorney, G. Dana Hobart.

8. Massachusetts Mutual has now paid all salary continuance benefits and long-term disability benefits to plaintiff.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes as follows:

1. The Court has jurisdiction of the parties and of the subject matter of plaintiff's claim by virtue of the Employee Retirement Income Security Act of 1974 ("ERISA").

2. Massachusetts Mutual's Salary Continuance Plan is an employee benefit plan as defined in ERISA and is subject to ERISA.

3. ERISA governs plaintiff's claims for disability benefits and preempts all state laws relating to her claims under Massachusetts Mutual's Salary Continuance Plan,

including any state law claims for breach of statutory duties under California *Insurance Code*, Section 790.03, intentional infliction of emotional distress, negligent infliction of emotional distress and breach of fiduciary duties.

4. Federal law developed under ERISA bars any claims for extra-contractual damages and punitive damages arising out of the original denial of plaintiff's claims for benefits under the Salary Continuance Plan and the subsequent review thereof.

5. Massachusetts Mutual's Plan Administrator complied with the provisions for review of ERISA claims in 29 C.F.R. § 2560.503-1(h) and timely rendered his decision regarding his review of plaintiff's claim.

6. Massachusetts Mutual did not breach the employment contract nor any covenant of good faith and fair dealing in connection with the termination of plaintiffs' employment.

7. Plaintiff did not suffer any financial loss as a proximate result of the termination of her employment.

8. Plaintiff's claims for intentional or negligent distress arising out of the termination of employment are barred by the exclusive remedy provisions of California *Labor Code*, Sections 3600-3601.

9. The relief prayed for in plaintiff's Complaint relating to each of the seven causes of action should be denied, and plaintiff should take nothing by reason of the claims in her Complaint.

10. Plaintiff's Complaint is hereby dismissed with prejudice.

11. Defendants are entitled to their costs in the amount of $__________.

If any of the foregoing Findings of Fact are construed to be Conclusions of Law, the same shall be deemed

to be Conclusions of Law. If any of the foregoing Conclusions of Law are construed to be Findings of Fact, the same shall be deemed to be Findings of Fact.

LET SUMMARY JUDGMENT BE ENTERED ACCORDINGLY.

Dated: Aug. 24, 1981

/s/ Manuel L. Real
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-81-116-R

DORIS RUSSELL AND RONALD RUSSELL,
Plaintiffs,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, CECILIA STEVENSON and DOES 1 through 50, inclusive,
Defendants.

Date: August 3, 1981

Time: 10:00 a.m.

SUMMARY JUDGMENT

[Filed Aug. 24, 1981]

The Motion for Summary Judgment of defendants Massachusetts Mutual Life Insurance Company ("Massachusestts Mutual") and Cecilia Stevenson ("Stevenson") came on regularly for hearing on August 17, 1981 before the Honorable Manuel Real, Judge presiding. Plaintiff Doris Russell appeared by her attorneys of record, Baker & Burton, by Brad N. Baker, Esq. Defendants appeared by their attorneys of record, Adams, Duque & Hazeltine, Richard T. Davis, Jr., Esq. and David L. Bacon, Esq. The Court, having heard oral argument and having duly considered the memoranda submitted by the parties, the affidavits submitted by Massachusetts Mutual and Stevenson, and all of the records and files herein, and having made its Findings of Fact and Conclusions of Law, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That this Court has jurisdiction over the parties and of the subject matter of plaintiff's Complaint.

2. Defendants' Motion for Summary Judgment in their favor on each of the seven claims in plaintiff's Complaint be and it hereby is granted.

3. That plaintiff take nothing by reason of said claims in her Complaint; that the Complaint and the action be dismissed with prejudice; and that the relief prayed for therein be and it hereby is denied.

DATED: Aug. 24, 1981

/s/ Manuel L. Real
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5879

DC# CV 81-0116 R (Central California)

DORIS RUSSELL,
Plaintiff-Appellant,
vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, *et al.*,
Defendants-Appellees.

[Filed Jan. 13, 1984]

ORDER

Before: REINHARDT, Circuit Judge.

Appellees' motion for an extension of time to file a petition for rehearing is granted. The petition shall be filed within 21 days of the date of this order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5879

D.C. No. 81-0116

(Central District, California)

DORIS RUSSELL,
Plaintiff-Appellant,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
CELIA STEVENSON,
Defendants-Appellees.

Before: FLETCHER, PREGERSON, and REINHARDT, Circuit Judges.

ORDER

[Filed Apr. 6, 1984]

The panel as constituted in the above has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

STATUTORY PROVISIONS

Employee Retirement Income Security Act of 1974, as amended.

1. Section 409, 29 U.S.C. § 1109 (1982). Liability for Breach of Fiduciary Duty.

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

2. Section 501, 29 U.S.C. § 1131 (1982). Criminal Penalties.

Any person who willfully violates any portion of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

3. Section 502, 29 U.S.C. § 1132 (1982). Civil Enforcement.

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) (1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a) (5) with respect to a violation of or the enforcement of, parts

2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515.

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute

service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) (1) Except for actions under subsection (a) (1) (B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a) (1) (B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) (1) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954.

(h) A copy of the complaint in any action under this title by participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a) (1)

(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975 (f)(4) of the Internal Revenue Code of 1954); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code.

(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the

Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

4. Section 503, 29 U.S.C. § 1133 (1982). Claims Procedure.

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

Regulations promulgated under Section 503 of ERISA, 29 U.S.C. 1133 (1982).

Section 2560.503-1, 29 C.F.R. § 2560.503-1 (1983). Claims Procedure.

(a) *Scope and purpose.*—(1) This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials, hereinafter referred to in the aggregate as "claims procedures." Except as otherwise noted, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Employee Retirement Income Security Act of 1974 (the Act).

(b) *Obligation to establish a reasonable claims procedure.* Every employee benefit plan shall establish and maintain reasonable claims procedures.

(1) A claims procedure will be deemed to be reasonable only if it:

(i) Complies with the provisions of paragraphs (d) through (h) of this section, except to the extent that it is deemed to comply with some or all of such provisions under the authority of paragraph (b)(2) or paragraph (j) of this section. [Amended by 46 FR 5882, originally scheduled to be effective February 20, 1981. However, the effective date was delayed under the President's regulation freeze at least until March 30, 1981 (46 FR 11253).]

(ii) Is described in the summary plan description, as required by § 2520.102-3,

(iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation or processing of plan claims, and

(iv) Provides for informing participants in writing, in a timely fashion, of the time limits set forth in paragraphs (e)(3) and (g)(3) and subsection (h).

(2) In the case of a plan established and maintained pursuant to a collective bargaining agreement (other than a plan subject to the provisions of section 302(c)(5) of the Labor Management Relations Act, 1947 concerning joint representation on the board of trustees):

(i) Such plan will be deemed to comply with the provisions of paragraphs (d) through (h) of this section if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference

(A) Provisions concerning the filing of benefit claims and the initial disposition of benefit claims, and

(B) A grievance and arbitration procedure to which denied claims are subject.

(ii) Such plan will be deemed to comply with the provisions of paragraphs (g) and (h) of this section (but will not be deemed to comply with paragraphs (d) through (f)) if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference a grievance and arbitration procedure to which denied claims are subject (but not provisions concerning the final and initial disposition of benefit claims).

(c) *Claims procedure for an insured welfare or pension plan.*—(1) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for filing of a claim for benefits with and notice of decision by such company, service or organization.

(2) See paragraph (g) regarding review and final decision on denied claims by insurance companies, insurance services and similar organizations.

(d) *Filing of a claim for benefits.* For purposes of this section, a claim is a request for a plan benefit by a participant or beneficiary. A claim is filed when the requirements of a reasonable claim filing procedure of a plan have been met. If a reasonable procedure for filing claims has not been established by the plan, a claim shall be deemed filed when a written or oral communication is made by the claim-

ant or the claimant's authorized representative which is reasonably calculated to bring the claim to the attention of:

(1) In the case of a single employer plan, either the organizational unit which has customarily handled employee benefits matters of the employer, or any officer of the employer.

(2) In the case of a plan to which more than one unaffiliated employer contributes, or which is established or maintained by an employee organization, either the joint board, association, committee or other similar group (or any member of any such group) administering the plan, or the person or organizational unit to which claims for benefits under the plan customarily have been referred.

(3) In the case of a plan the benefits of which are provided or administered by an insurance company, insurance service, or other similar organization, which is subject to regulation under the insurance laws of one or more states, the person or organizational unit which handles claims for benefits under the plan or any officer of the insurance company, insurance service, or similar organization.

(4) For purposes of paragraphs (d) (1), (2), and (3) of this section, a communication shall be deemed to have been brought to the attention of an organizational unit if it is received by any person employed in such unit.

(e) *Notification to claimant of decision.*—(1) If a claim is wholly or partially denied, notice of the decision, meeting the requirements of paragraph (f) of this section, shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan.

(2) If notice of the denial of a claim is not furnished in accordance with paragraph (e) (1) of this

section within a reasonable period of time, the claim shall be deemed denied and the claimant shall be permitted to proceed to the review stage described in paragraph (g) of this section.

(3) For purposes of paragraphs (e) (1) and (2), of this section, a period of time will be deemed to be unreasonable if it exceeds 90 days after receipt of the claim by the plan, unless special circumstances require an extension of time for processing the claim. If such an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the initial 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to render the final decision.

(f) *Content of notice.* A plan administrator or, if paragraph (c) of this section is applicable, the insurance company, insurance service, or other similar organization, shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant;

(1) The specific reason or reasons for the denial;

(2) Specific reference to pertinent plan provisions on which the denial is based;

(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and

(4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

(g) *Review procedure.* (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(i) Request a review upon written application to the plan;

(ii) Review pertinent documents; and

(iii) Submit issues and comments in writing.

(2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for review of and decision upon denied claims by such company, service or organization. In each case, that company, service, or organization shall be the "appropriate named fiduciary" for purposes of this section. In all other cases, the "appropriate named fiduciary" for purposes of this section may be the plan administrator or any other person designated by the plan, provided that such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.

(3) A plan may establish a limited period within which a claimant must file any request for review of a denied claim. Such time limits must be reasonable and related to the nature of the benefit which

is the subject of the claim and to other attendant circumstances. In no event may such a period expire less than 60 days after receipt by the claimant of written notification of denial of a claim.

(h) *Decision on review.*—(1) (i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary, which holds regularly scheduled meetings at least quarterly, a decision on review shall be made by no later than the date of the meeting of the committee or board which immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a decision may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require a further extension of time for processing, a decision shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review.

(2) If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the claimant prior to the commencement of the extension.

(3) The decision on review shall be in writing and shall include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h) (1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

(i) *Apprenticeship plans.* This section does not apply to employee benefit plans which provide solely apprenticeship training benefits.

Effective date: This section becomes effective for claims filed on or after October 1, 1977.

(j) *Qualified Health Maintenance Organizations.* Claims procedures with respect to any benefits provided through membership in a qualified health maintenance organization, as defined in section 1310 (d) of the Public Health Service Act, as amended, 42 U.S.C. § 300e-9(d), shall be deemed to satisfy the requirements of this section with respect to the provision of such benefits to persons who are members of such qualified health maintenance organization, provided those procedures meet the requirements of section 1301 of the Public Health Service Act, as amended 42 U.S.C. § 300e and the regulations thereunder. [Added by 46 FR 5882, originally scheduled to be effective February 20, 1981. However, the effective date was delayed under the President's regulation freeze until March 30, 1981 (46 FR 11253).]

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY

Springfield, Massachusetts 01111/(413) 788-8411

October 17, 1979

Mrs. Doris Russell
1967 N. Avenue 52
Los Angeles, California 90042

Dear Mrs. Russell:

This is to inform you that effective October 17, 1979, your Salary Continuance benefits are terminated. Our decision to terminate benefits is based on Dr. Michael D Rosco's opinion that you are not disabled in any way which prevents you from performing your usual duties for the Massachusetts Mutual. Our action is in accordance with Article III. Benefits and Claim Procedures as shown in the Employee Salary Continuance booklet.

As you had indicated to your Manager in June, 1979, that you did not wish to relocate when the office was moved, your employment with the Massachusetts Mutual is terminated also effective October 17, 1979.

If you wish to appeal the discontinuance of Salary Continuance benefits, you may do so by contacting the Plan Administrator within sixty days. You may review any documents related to the discontinuance of benefits and submit in writing further information and comments.

The Plan Administrator will make a final decision on a review of your claim within sixty days. He will give specific reasons and references to the plan provision on which his decision is based. The sixty days may be extended for another sixty days if the Plan Administrator feels that special circumstances exist which require an extension of time. The Plan Administrator's address is:

Plan Administrator, Salary Continuance Plan
c/o Payroll Section
Employee Services Department
Massachusetts Mutual Life Insurance Company
1295 State Street
Springfield, MA 01111

Sincerely,

/s/ Charles S. Dole
CHARLES S. DOLE
Director of Group Claims

CSD:sla

L.A., Ca. 90042

22 October 79

Mass. Mutual Life Insurance Co.
Springfield, Mass.
Charles S. Dole

Dear Mr. Dole:

Thank you for your letter of October 17. The information contained therein opens the door to a thorough housecleaning of Paypoint G-213, and an exposé of its management practices.

Point 1. Your decision to terminate my Salary Continuance benefits was influenced by an orthopedist. My own orthopedist clearly states that my problem is not orthopedic in nature—but, he agrees that the problem exists and prevents my performing any of the duties of my regular occupation. Further information on this will be forthcoming.

Point 2. Your decision to terminate my employment is based on inaccurate information. In no way, either verbally or in writing, did I inform Mrs. Stevenson of any intention not to make the move to the new location. Another of Mrs. Stevenson's many errors in judgment, and/or misinterpretation of another's statement to suit her purposes . . . and this one will not be overlooked in the final exposure.

I definitely wish to appeal the discontinuance of Salary Continuance, and I also wish to apply for Long Term Disability. I phoned the Plan Administrator and spoke to Peter Feige(?), who asked that I send a written re-

quest for documents mentioned in Par. 3 of your letter. Perhaps you will be kind enough to convey this request to him.

In addition, I am requesting: 1. A copy of LTD plan, and application for benefits. 2. The name and address of Mass. Mutual's Workmen's Compensation carrier.

Your prompt cooperation in getting these items will be appreciated.

Sincerely,

/s/ Doris Russell
DORIS RUSSELL
DR/sf

P.S. I still have 8 days vacation time due for this year. I trust that compensation for this will be included with my final check (Per State of Calif. Labor Code Sect. 201), as you have contended that I am not ill, and have terminated me for nebulous reasons without notice or compensatory salary. (2 weeks notice or severance pay.)

October 25, 1979

Mrs. Doris Russell
1967 N. Avenue 52
Los Angeles, CA 90042

Dear Mrs. Russell:

This letter acknowledges your October 22, 1979 request to Mr. Dole for an appeal of the decision to discontinue Salary Continuance benefits. Until I receive the further information to which you refer in "Point 1" of your letter, I do not feel that I can complete a fair examination of the facts. You can be assured that I will give your appeal prompt attention upon receipt of that information.

I have been informed that Mr. Feige has provided the documents which you requested, i.e. Dr. Rosco's report and a copy of the Salary Continuance booklet, and that Mr. Demchuck has provided you with information concerning our Workers' Compensation carrier. I have also been informed that Mrs. Emery is processing your final pay, which will include payment for unused vacation per our standard procedures. If you desire further information in any of these areas, feel free to write directly to me.

I have enclosed a copy of our employee Long Term Disability Plan booklet. A complete copy of the Plan document can be purchased for $1.00 by sending a check payable to Massachusetts Mutual to Mr. Feige. I have not enclosed an application for LTD benefits because your eligibility for benefits ceased upon termination of employment.

Sincerely,

/s/ R. Allison Johnson
Plan Administrator
Salary Continuance Plan

RAJ:rfl
C:Dole

Doris Russell
1967 N. Avenue 52
Los Angeles, CA 90042

November 27, 1979

R. Allison Johnson, C.L.U.
Plan Administrator
Salary Continuance Plan
Mass. Mutual Life Ins. Co.

Re: Appeal for reinstatement of Salary Continuance Benefits

Dear Mr. Johnson:

Enclosed are copies of the following:

1. Dr. Ziferstein's report (also being used in connection with my Workmen's Compensation claim), which outlines the true nature of my disabling illness.
2. Medical claim form submitted by Dr. Ziferstein direct to Mass. Mutual Employee Services.
3. Dr. Rosco's reply to my rebuttal of his report.
4. Questionnaire which I completed in Dr. Rosco's office prior to examination of 9/18/79. (I have made notations on this to clarify certain answers. Circled items are Dr. Rosco's notations, not mine.)
5. X-ray reports from two chiropractic roentgenologists. Note that the x-rays were taken two years apart, in 1977 and 1979. Both indicate muscular spasms. My symptoms prior to and during those two years indicate that the spasms were continuous, and not two separate incidents.

The enclosed items, together with a thorough and careful review of my personal medical claim file (at Spring-

field), should enable any unbiased committee to accurately evaluate my claim and arrive at a fair decision.

Very truly yours,

/s/ Doris Russell
DORIS RUSSELL

DR/sf

COPY: State of California
Department of Insurance

P. S. Would you kindly instruct Employee Services to send any medical claim payments and/or correspondence direct to me? My final paycheck was forwarded to me from the Hacienda Heights office in an *unsealed* envelope. I'm surprised the check wasn't lost in transit. Furthermore, as I am no longer an employee of PP G 213, I do not wish to have confidential information passed through that office.

March 11, 1980

Mrs. Doris Russell
1967 N. Ave. 52
Los Angeles, CA 90042

Dear Mrs. Russell:

I have completed my review of your appeal of our denial of Salary Continuance benefits. Based on the additional information which you provided, it is my opinion that you are entitled to receive benefits for a temporary period. I have instructed Mr. Denis Hunady to discuss with you the details of my decision.

Sincerely,

/s/ R. Allison Johnson

RAJ:rfl

April 1, 1980

Mrs. Doris Russell
1967 N. Avenue 52
Los Angeles, CA 90042

Dear Mrs. Russell:

The attached worksheet provides an explanation of the payment of $4,106.55 made to you. As you will see in that worksheet, appropriate taxes and Group Insurance contributions have been withheld. Disability benefits, when approved, will be retroactive to coincide with the exhaustion of Salary Continuance benefits. As I mentioned the other day, we will process your claim as soon as we receive the claim forms.

You had asked for information concerning reports from Dr. Allred. The only report we received prior to the October 17, 1979, termination of benefits was dated July 1979. Subsequent to the termination of benefits, we received a report from Dr. Allred dated October 16, 1979.

Sincerely yours,

Peter A. Feige
Associate Director of Employee Benefits

Salary Continuance:	10	days @ full pay	$ 618.70
	68½	days @ 2/3 pay	2,824.94
	15	days @ 1/3 pay	309.30
Holiday pay:	6	days @ full pay	371.22
Additional accrued vacation:	10	days @ full pay	618.70
Gross Pay			$4,742.86
Less: FICA (on vacation and holiday only)			− 60.68
Federal Tax			−420.58
State Tax			− 48.60
State Disability (on vacation and holiday only)			− 9.90
Group Insurance			− 96.55
Net Pay			$4,106.55

(2)

No. 84-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CELIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

In The

Supreme Court of the United States

October Term, 1984

No. 84-9

Massachusetts Mutual Life Insurance Company,
and Celia Stevenson,
Petitioners,

v.

Doris Russell,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

The American Council of Life Insurance ("Council") and the Health Insurance Association of America ("HIAA") hereby move, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief as amici curiae. Consent to the filing of this brief has been obtained from counsel for the Petitioners. Counsel for the Respondent has refused consent.

The Council is the largest life insurance trade association in the United States, representing the interests of 611 member life insurance companies including most of the major life insurers in the country. The Council's members currently hold more than ninety-five percent of the life insurance in force in legal reserve life insurance companies in the United States. Member companies also account for ninety-nine percent of the insured private pension plan business in the United States. The HIAA represents the interests of 327 member companies which write over eighty-five percent of the health insurance written by insurance companies in the United States, and the combined memberships of the HIAA and the Council represent over ninety percent of the health insurance written by insurance companies in the United States.

The life insurance and health insurance industries affect many individuals in our nation's work force. Over 60 million Americans in 1981 held some form of short-term disability income protection, and 21.6 million individuals were protected by long-term disability programs sponsored by insurance companies. *See* Source Book of Health Insurance Data 1982-83, Health Insurance Association of America. Moreover, during 1980, 500,000 private pension plans, 6,600 state and local government pension plans, and 38 federal workers retirement plans were in existence in the United States. *See* Ghysels, "The Role of Insurers in Group Pensions," Best's Review, Vol. 81, p. 20 (Dec. 1980). These plans represented more than $550 billion in assets. *Id.* More specifically, at the end of 1980, private pension plans administered by U.S. legal reserve life insurance companies provided coverage to 26.1 million Americans. *See* American Council of Life Insurance, 1982 Pension Facts. Assets backing those plans totaled $165.8 billion, an increase of 19 percent over the immediately preceding year. *Id.* By 1982, the number of Americans covered by private pension

plans administered by U.S. legal reserve life insurance companies had risen to 30.5 million, with assets totaling $228.9 billion. *Id.*

Many members of the Council and the HIAA provide benefits to their employees under plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* Because the Council and the HIAA have nationwide constituencies, they are peculiarly able to present to the Court the views of the life insurance and health insurance industries on the importance of this Court's review of the issue in this case: whether ERISA permits a plan beneficiary or participant to recover extra-contractual and punitive damages from a plan fiduciary for a breach of its statutory duties. The Council and the HIAA are genuinely concerned that the substantial confusion among the lower federal courts regarding the role of punitive damages in ERISA actions will result in a haphazard and inconsistent enforcement of ERISA's comprehensive statutory scheme on a nationwide basis.

Because of the Ninth Circuit's opinion in particular and the uncertainty in the law of punitive damages in general, members of the Council and the HIAA who voluntarily establish employee benefit plans are confronted with the possibility that the processing of a benefit claim will be accompanied by a substantial, yet wholly unpredictable, punitive award. The prospect of incurring substantial punitive damages awards for mishandling benefit claims will have a detrimental impact on the willingness and the ability of members of the Council and the HIAA to establish future, or increase contributions to, employee benefit plans.

For these reasons, the motion for leave to file the attached brief of amici curiae in support of the Petition should be granted.

Respectfully submitted,

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AUGUST, 1984

BRIEF FOR AMICI CURIAE

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act permits an employee benefit plan participant or beneficiary to recover punitive damages or extra-contractual compensatory relief from a plan fiduciary for improper or untimely processing of benefit claims?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-9

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CELIA STEVENSON,

Petitioners,

v.

DORIS RUSSELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

This brief is filed on behalf of the American Council of Life Insurance and the Health Insurance Association of America, as amici curiae, in support of the petition for certiorari.

INTERESTS OF THE AMICI

As indicated in the Motion accompanying this Brief, the American Council of Life Insurance ("Council") is the largest life insurance trade association in the United States, and the Health Insurance Association of America ("HIAA") represents the interests of 327 member companies which write over eighty-five percent of the health insurance written by insurance companies in the United

States. The combined memberships of the HIAA and the Council are responsible for more than ninety percent of the health insurance written by insurance companies in the United States.

The prospect of incurring substantial punitive damages awards for mishandling benefit claims—a prospect made a reality by the Ninth Circuit's opinion below—is a matter of grave concern to members of the Council and the HIAA. As with any form of insurance, a predictable allocation of risks and costs, based upon historical patterns of benefit payments, is essential to the financial integrity of these benefit plans. Because the opinion below creates the possibility that the processing of a benefit claim may be accompanied by a substantial, yet unpredictable, punitive award, the stability of the plans administered by members of the Council and the HIAA is seriously threatened. Members will be forced to incur the increased costs of defending actions seeking punitive relief and of making payment of unmeritorious claims to avoid such actions in the future. Faced with large and unpredictable punitive awards, employers may be unwilling, or unable, to increase contributions to employee benefit plans. Moreover, given the voluntary nature of such plans, employers may be discouraged from establishing new plans due to the increased liabilities associated with such plans. Because the decision of the Ninth Circuit portends serious adverse effects on the insurance industry and the benefit plans its members administer, the Council and the HIAA have a direct and immediate interest in the question presented in this case. In addition, members who provide benefits to their own employees have the same concern as any other employers offering employee welfare benefit plans to their employees.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 722 F.2d 482 (Pet. App. 1a-25a). The opinion of the United States District Court for the Central District of California is not reported. It is set forth at pp. 26a-30a in the Appendix to the Petition.

JURISDICTION

The judgment below was entered on December 16, 1983. A petition for rehearing and suggestion for rehearing en banc, filed by the petitioners, was denied on April 6, 1984 (Pet. App. 34a). The Petition for Certiorari was filed on July 5, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") provides, in pertinent part, that:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover his benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a) (1982).

Section 409(a) of ERISA provides, in relevant part, that:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (1982).

STATEMENT

Massachusetts Mutual Life Insurance Company ("Mutual") provides disability benefits to its employees under two plans: the Employee Salary Continuance Plan ("ESCP") and the Employee Disability Plan ("EDP"), both of which are funded by company assets. The ESCP provides benefits based upon a percentage of an employee's salary. The EDP provides disability benefits when all benefits under ESCP are exhausted, and when an employee is disabled for a minimum of eight weeks. Both plans are benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. §§ 1001 *et seq.*

The respondent here, an employee of Mutual, took a leave of absence in May, 1979, due to a back ailment. Respondent submitted a claim for disability benefits, and Mutual began paying salary continuance benefits under its plan. Payment of these benefits, however, was terminated in October, 1979. The reason for the termination

was an orthopedic specialist's report that respondent was not physically disabled.

Respondent took an internal appeal of Mutual's decision to terminate her salary continuance benefits. Respondent also underwent an independent psychiatric examination, after which the examining physician concluded that respondent was temporarily disabled due to psychiatric illness. Based upon this information, Mutual in March, 1980, resumed paying her salary continuance benefits. All accrued salary continuance benefits owed to the respondent were paid by Mutual, and respondent continues to receive long-term disability benefits under Mutual's disability plan.

Respondent initiated this action in a California Superior Court to recover damages which she claims were caused by Mutual's alleged improper handling of her claim for disability benefits. In her complaint, respondent asserted various state law causes of action, including breach of the covenant of good faith and fair dealing under California law, breach of fiduciary duty, breach of her employment contract, and intentional and negligent infliction of emotional distress. Respondent sought both compensatory and punitive damages. Mutual removed the action to the United States District Court for the Central District of California on grounds that respondent's causes of action "related to" her benefits and were thus preempted by ERISA. *See* 29 U.S.C. § 1144.

The Proceedings Below

After removal to the district court, Mutual moved for summary judgment, which the district court granted in favor of Mutual as to all claims. The court found that ERISA preempted respondent's claims relating to plan benefits, including her claims for intentional and negli-

gent infliction of emotional distress and breach of fiduciary duties. In concluding that the respondent was entitled to neither compensatory nor punitive damages, the court ruled that extra-contractual damages arising out of a denial of benefit claims were not recoverable under ERISA.

On appeal, a panel of the Ninth Circuit agreed with the district court that ERISA preempted the state law causes of action based upon Mutual's alleged mishandling of respondent's disability claims. The court of appeals ruled, however, that the respondent had alleged a federal cause of action which was cognizable under ERISA. Specifically, the appellate court held that section 502(a)(2) and 409(a) of ERISA afford plan beneficiaries the right to bring an action against plan fiduciaries for a breach of their duties based upon an alleged improper handling of benefit claims. Emphasizing the remedial nature of the Act, the court ruled that Congress intended this federal cause of action to extend not only to conduct relating to the management of plan assets but also to the handling and processing of benefit claims.

Extrapolating from this implied federal cause of action, the court of appeals determined that ERISA permits plan beneficiaries to recover compensatory damages proximately caused by a breach of fiduciary duty and that such damages are not limited to the amount of any benefit loss. To support its holding that ERISA permits recovery of extra-contractual damages, the court of appeals cited section 409 as a broad provision giving courts "wide discretion" to award any appropriate equitable or remedial relief. *Russell v. Massachusetts Mutual Life Insurance Company*, 722 F.2d 482, 490 (9th Cir. 1983). On this basis, the court found extra-contractual damages to be appropriate relief under ERISA. Such relief, the court determined, was necessary to make aggrieved parties whole and to discourage fiduciaries from ignoring their duties under the Act.

Further expanding the relief available to parties pursuing this cause of action, the court of appeals held that punitive damages are also recoverable under ERISA. The court reiterated its conclusion that section 409 confers broad discretion upon courts fashioning appropriate relief and stated that Congress did not intend to exclude the imposition of sanctions against fiduciaries who fail to meet their duties. The court nevertheless added that an award of punitive damages would only be appropriate where the fiduciary acted with "actual malice or wanton indifference to the rights of a participant or beneficiary." *Id.* at 497.

REASONS FOR GRANTING THE WRIT

1. The Current Confusion among the Lower Federal Courts Concerning the Availability of Punitive Damages under ERISA Can Only Be Resolved by This Court.

This case presents a critical issue of federal law which has generated substantial confusion among the lower federal courts: whether the Employee Retirement Income Security Act permits a plan participant or beneficiary to recover punitive damages from a fiduciary for a breach of its duties under the Act. The court below concluded that ERISA does permit an award of punitive damages.[1] The Eighth Circuit, however, has voiced serious doubts

[1] The Ninth Circuit has twice held that punitive damages are recoverable under ERISA. In addition to the instant case, the Ninth Circuit held in *Winterrowd v. David Freedman and Company*, 724 F.2d 823 (9th Cir. 1984), that punitive damages are available in an action under ERISA for the willful failure of an employer to make pension fund contributions.

that ERISA contemplates such awards.[2] Moreover, the decisions of the federal district courts addressing this issue reflect a lack of unanimity and inconsistent reasoning concerning this important subject.[3]

Only this Court can effectively resolve the uncertainty among the lower federal courts as to the role, if any, that punitive damages play in the enforcement scheme of ERISA. Without guidance from this Court, the lower federal courts will be unable to enforce the civil liability provisions of ERISA in a consistent and predictable manner; and fiduciaries who are governed by this comprehensive federal statute (many of whom operate in many states) will be confronted with the anomalous result of being subjected to punitive damages awards in one judicial district yet not in another. Moreover, in the districts permitting such awards, the vagueness of judicial tests and factors for determining whether, and in what amount, punitive damages should be awarded poses a substantial threat of haphazard and potentially excessive punitive damages awards. Such an inconsistent and unpredictable enforcement of this comprehensive statutory scheme can only thwart, rather than promote, the purposes and policies underlying the Act.

[2] In *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 and 1084 (1981), the Eighth Circuit refused to uphold an award of punitive damages, totaling $150,000, in an action under ERISA arising from a termination of plan benefits and from an alleged interference with a benefit plan. In reversing the district court's award of punitive damages, the Court stated (653 F.2d at 1216):

> We do not think punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts. However, we need not decide this issue, because we find that punitive damages are inappropriate in this case under either 29 U.S.C. § 1132(a) or § 1140.

[3] Included among the cases refusing to permit awards of punitive damages in actions brought for ERISA violations are: *Zittrouer v. UARCO Incorporated Group Benefit Plan*, 582 F. Supp. 1471 (N.D. Ga. 1984); *Meyer v. Phillip Morris, Inc.*, 575 F. Supp. 1232 (E.D. Mo. 1983); *Hechenberger v. Western Electric Co.*, 570 F. Supp. 820 (E.D. Mo. 1983); *Whitaker v. Texaco*, 566 F. Supp. 745 (N.D. Ga. 1983); *Maxfield v. Central States*, 559 F. Supp. 158 (N.D. Ill. 1982); *Diano v. Central States*, 551 F. Supp. 861 (N.D. Ohio 1982); *Haskins v. Retirement Plan*, No. 78C3670 (N.D. Ill. 1982); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979); and *Hurn v. Retirement Fund Trust*, 424 F. Supp. 80 (C.D. Cal. 1976). Cases reaching a contrary result include: *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677 (C.D. Cal. 1982); *Free v. Gilbert Hodgman, Inc.*, 3 Empl. Ben. Cas. (BNA) 1010 (N.D. Ill. 1982); *Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980); and *Bittner v. Sadoff and Ruday Industries*, 490 F. Supp. 534 (E.D. Wisc. 1980).

2. The Ninth Circuit's Determination that ERISA Permits a Beneficiary or Participant to Recover Punitive Damages and Extra-contractual Relief from a Plan Fiduciary Is Inconsistent with the Act's Express Language and with the Policies Embodied in the Act.

The Ninth Circuit misconstrued the statute when it endorsed the use of punitive and extra-contractual damages in ERISA enforcement actions, despite the conspicuous absence of statutory language permitting such awards. Moreover, the court of appeals misinterpreted the Act when it allowed such damages to be awarded to plaintiffs who pursue a cause of action which is not expressly provided for in the statute.[4]

[4] Section 502(a) of the Act accords the Secretary of Labor, plan participants, beneficiaries, and fiduciaries the right to bring a civil action for "appropriate relief" under section 409. *See* 29 U.S.C. § 1132(a)(2). Section 409 provides that plan fiduciaries may be held personally liable "to such plan," and may be "subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a). In accordance with the plain terms of the statute, therefore, fiduciary liability runs directly to the plan, and not to plan beneficiaries. Moreover, the type of "other" relief contemplated, *e.g.*, removal of a fiduciary, appears not to encompass awards of punitive and extra-contractual relief directly to plan beneficiaries.

This Court has hesitated to award punitive damages where clear congressional guidance is absent. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). In *Foust*, the Court addressed the question whether punitive damages could be assessed under the Railway Labor Act against a union for a breach of its duty of fair representation. The cause of action in *Foust* was judicially implied, and, accordingly, Congress had not specified the type of remedial relief available in fair representation suits. In the absence of clear congressional guidance, this Court refused to permit punitive damages to be awarded, noting that the benefits of increasing a union's willingness to pursue individual complaints due to the threat of punitive damages were offset by the possibility that punitive awards would upset the balance of individual and collective interests and could impair the financial stability of unions. Further, the court viewed punitive damages awards to be incompatible with the "essentially remedial" purpose of the Railway Labor Act. *Id.* at 52.

ERISA, like the Railway Labor Act, is essentially remedial in nature. Congress specifically provided a comprehensive enforcement scheme designed to protect employee rights and the integrity of employee benefit plans.[5] Nowhere in this scheme, however, did Congress mention or imply that punitive damages would be available to beneficiaries seeking relief under the statute.[6]

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[5] In addition to the detailed remedies provided in ERISA's civil enforcement section, *see* 29 U.S.C. § 1132, the Act imposes criminal penalties, including imprisonment and fines up to $100,000, upon those who willfully violate ERISA's reporting and disclosure provisions. *See* 29 U.S.C. § 1131.

[6] Congress knows how to provide for punitive damages where it deems such relief to be appropriate. Congress has explicitly incorporated punitive damages provisions into various federal statutes. *See, e.g.*, Clayton Act § 4, 15 U.S.C. § 15 (1976) (treble damages); Consumer Credit Protection Act § 616, 15 U.S.C. § 1681(n) (1982) (punitive damages); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520 (1982) (punitive damages); Civil Rights Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1976) (punitive damages).

Construing this silence to permit punitive damages to be assessed personally against a fiduciary also runs counter to the policies embodied in the Act. In enacting ERISA, Congress carefully weighed the rights and interests of plan beneficiaries against the interests of employers in administering effective and cost-efficient plans. Congress was "constrained to recognize the voluntary nature of private" plans and accordingly weighed "[t]he relative improvements required by this Act . . . against the additional burdens to be placed on the system." H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639. Acknowledging congressional concern about the impact of increased costs upon the pension industry, Senator Nelson, during floor debate on the Conference Report, stated:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, . . . Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

Senate Comm. on Labor and Public Welfare, Senate Consideration of Conference Report to Accompany H.R. 2, *reprinted in* 3 Legislative History of the Employee Retirement Income Security Act of 1974, 4733 at 4800 (1976).

The Ninth Circuit's decision unsettles this delicate balance of costs and benefits. The decision exposes employers, who voluntarily establish employee benefit plans, to sig-

nificant costs associated with unpredictable and potentially excessive punitive damages awards. The direct costs of punitive damages to employers and insurers include increased costs in handling benefit claims, in paying out unmeritorious claims to avoid punitive awards, and in defending against suits which threaten wholly unpredictable results. *See* Kouri and Barrett, *Punitive Damages—Update*, Legal Section Proceedings of the American Council of Life Insurance 685, 696 (1979).[7] The decision of the court below invites frivolous litigation by disgruntled participants and beneficiaries seeking to recover substantial punitive and extra-contractual relief, as well as "strike suits" in which the plaintiff seeks a settlement motivated by the defendant's need to avoid the risk of unpredictable punitive damages, and the expense and time of its officers involved in a suit. *See Smith v. Wade*, 103 Sup. Ct. 1625, 1642 (1983) (dissenting opinion).

The imposition of punitive damages against plan fiduciaries would thus significantly increase the costs Congress carefully sought to minimize when it enacted ERISA. While the threat of punitive damages awards may deter breaches of fiduciary obligations, the detrimental impact of such awards on the continuing viability of employee benefit plans far offsets the benefits to be gained from deterrence. Because this case presents an important question of federal law, this Court should grant the Petition and clarify the critical statutory and policy issues presented.

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[7] The indirect costs of exposing these employers and insurers to punitive and extra-contractual damages are also substantial. Such exposure would initiate a reversal of the trend witnessing the expansion of the number of benefit plans and the number of individuals covered by those plans. The proliferation of substantial and unpredictable punitive damages awards would discourage the future establishment of employee benefit plans. Moreover, exposure to punitive damages claims would deter employers from increasing their contributions to existing plans and thus the benefits available under those plans.

3. No Workable Standards for Assessing Punitive Damages Exist and Current Practices Provide No Basis for Consistency or Predictability in Punitive Damages Awards.

The criminal law concept of punishment as an adjunct to the civil law is not new. Roots in the common law for extending criminal law notions of punishment to the civil law may be found in a few cases in eighteenth century England, where juries awarded small amounts of damages unrelated to tangible losses in order to punish conduct resulting in affronts to the honor and dignity of victims.[8] The doctrine of punitive damages found its way to American law, and in 1851, was recognized by this Court in a modest way in *Day v. Woodworth*, 13 Howard 363 (1851).[9] Consistent with their English counterparts, the

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[8] *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 12-20 (1982). Types of cases in which punitive awards were made included slander, trespass to land in certain cases, seduction, criminal conversation and false imprisonment.

[9] In *Day v. Woodworth*, the plaintiff brought an action for trespass *quare clausum fregit* after defendant and its agents removed a portion of the plaintiff's dam which was interfering with the proper functioning of the defendant's upstream dam. The case was tried to a jury, which awarded damages of $200. On a writ of error, this Court rejected plaintiff's argument that its recovery was not limited to actual damages, and affirmed the judgment of the lower court. Nevertheless, in a passage considered to be the foundation of punitive damages in American law, Justice Grier, writing for the Court, stated (13 Howard at 371):

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. . . . In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

early American courts apparently confined the doctrine to tortious conduct, such as libel or slander, where actual damages for humiliation or an affront to dignity were essentially unascertainable. *See Day v. Woodworth*, 13 Howard at 371; Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 Forum 377, 380-81 (1983).

In the 130 years following the *Day* decision, and particularly in the last decade, the doctrine of punitive damages has grown far beyond its origins in insult torts and has been stretched beyond the limits of its validity.[10] Punitive damages awards have become commonplace in insurance litigation[11] as well as in product liability

[10] As has been well said in another context, "these laws are being extrapolated to places where they no longer apply." Bernstein, "Dread Singularities" (Book Review), New York Times Book Review, April 25, 1982, p. 10.

[11] Juries have exhibited a tendency to award substantial sums as punitive damages in insurance cases. These awards present serious problems in the insurance industry, even though many of them have not fully survived judicial scrutiny. *See, e.g., San Jose Production Credit Association v. Old Republic Life Insurance Co.*, 723 F.2d 700 (9th Cir. 1984) (court reversed jury award of $500,000 in punitive damages for breach of implied covenant of good faith and fair dealing); *Dempsey v. Auto Owners Insurance Co.*, 717 F.2d 556 (11th Cir. 1983) (in action seeking recovery of fire loss under a policy, for bad faith refusal to pay, and for punitive damages, court held jury award of $3.1 million to be excessive and remanded with directions to require a remittitur to $1.5 million); *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982) ($3 million award of punitive damages for insurer's tortious termination of insurance benefits upheld); *Egan v. Mutual of Omaha*, 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979), *appeal dismissed*, 445 U.S. 912 (1980) (jury award of $5 million in punitive damages against insurer for failure to conduct proper investigation of its insured's claim held to be excessive in that award was 40 times larger than the compensatory damages award and represented two and one-half months of the insurer's net income in 1973 as well as more than seven months of its income in 1974); *Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 148 Cal. Rptr. 389 (Cal. 1978) (court upheld jury award of punitive damages, as reduced to $740,000 by the trial court, for insurer's "bad faith" refusal to settle). Moreover, at the trial level in state courts, particularly those in California and Arizona, staggering sums have been awarded as punitive damages against insurers. Juries in California have awarded substantial punitive damages against insurance companies in amounts up to $8 million. *See Frazier v. Metropolitan Insurance Co.*, No. C233-971, L.A. Super. Ct. (March 14, 1983) ($8 million punitive award); *Garvey v. State Farm and Casualty Co.*, No. 760226, S.F. Super. Ct. (Feb. 18, 1982) ($1 million punitive award in "bad faith" case). Juries in the Arizona courts have exhibited a similar willingness to assess exorbitant punitive awards against insurers, as evidenced by a $2 million punitive award in *Linthicum v. Nationwide Life Ins. Co.*, No. 446562, Maricopa County (Dec. 15, 1982), a $3.5 million award in *Hawkins v. Allstate Insurance Company*, and a $10 million punitive award in *Trus Joist Corp. v. Safeco Insurance Co.*, No. C366678, Maricopa County (March 21, 1983).

cases,[12] and prayers for punitive relief in mass tort

[12] Prior to 1970, apparently only one reported appellate court decision had upheld an award of punitive damages in a products liability case. That decision, *Toole v. Richardson-Merrill, Inc.*, 251 Cal.App.2d 689, 60 Cal. Rptr. 398 (1967), involved a jury award of $250,000 for a drug company's failure to conduct proper tests and to provide adequate warnings on a cholesterol-inhibiting drug. Since the *Toole* decision, however, cases in which juries have awarded punitive damages in excess of $1 million have abounded. *See, e.g., Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) (court reinstated jury award for $5 million in punitive damages), *modified on other grounds*, 670 F.2d 21 (5th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Airco Inc. v. Simmons First National Bank*, 276 Ark. 486, 638 S.W.2d 660 (Ark. 1982) (court affirmed jury award of $3 million in punitive damages); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980) (jury award of $1 million in punitive damages upheld); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981) (award of $1.1 million in punitive damages upheld); *Maxey v. Freightliner Corporation*, 450 F. Supp. 955 (N.D. Tex. 1978) (jury award of $10 million in punitive damages overturned), *aff'd*, 623 F.2d 395 (5th Cir. 1980), *vacated and remanded upon rehearing*, 665 F.2d 1367 (5th Cir. 1982), *vacated in part and affirmed in part*, 722 F.2d 1238 (5th Cir. 1984); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981) (court held jury award of $2,895,000 in punitive damages to be excessive); *Ford Motor Company v. Nowak*, 638 S.W.2d 582 (Tex. Ct. App. 1982) (court affirmed jury award of $4 million in punitive damages).

litigation are not uncommon.[13] Concurrent with the expansion of punitive damages beyond the traditional tort areas, the size and frequency of punitive damages awards have grown significantly.[14] In 1977, an informal survey by the American Council of Life Insurance revealed that nearly half of the 202 members in California who participated in the survey had extra-contractual or punitive damages actions pending against them, many with prayers exceeding $1 million. *See* Wilson, *Punitive Damages*, Legal Section Proceedings of the American Council of Life Insurance 13 (1977). Five years later, a member of the Council, having witnessed the proliferation of multi-million dollar punitive damages awards against insurers, stated:

> The imposing specter of extra-contractual damages pending over the life and health insurance industry developed in quantum proportions in the past year. What had been a threat became a reality. The sizable ad damna recited in many filed pleadings were translated into million-dollar payouts and multimillion dollar final awards.

Smith, *Annual Review of Litigation*, Legal Section Proceedings of the American Council of Life Insurance 349, 350 (1982).

Despite the phenomenal growth in the size and number of punitive damages awards, there has been no concurrent development of standards to guide courts and juries in assessing these awards. Examination of the cases shows that the standard of "maliciousness" has been lowered continuously over the past several years, and there is in fact little judicial control over it.[15] Even assuming that the requisite malicious or willful conduct exists to warrant an award of punitive damages, there are no standards to facilitate the determination of the appropriate measure of punitive damages. The broad discretion accorded to trial courts to award punitive damages significantly increases the risk that punitive damages awards will be arbitrary or excessive and altogether inappropriate based on the circumstances of the

[13] *See, e.g., Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984) (court disallowed jury award of punitive damages, totaling $625,000, in a strict liability action initiated by a shipyard worker for injuries allegedly caused by exposure to asbestos products); *Palmer v. A.H. Robins Co.*, No. 81SA149 (Colo. June 4, 1984) (court upheld jury award of $6.2 million in punitive damages against the producer of a contraceptive device which was marketed despite the serious adverse effects associated with the product's use). *See* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983).

[14] *See* notes 11, 12, and 13, *supra*. A report of the Ford Motor Company revealed that, prior to 1970, less than 0.5% of the products liability complaints filed against the company contained prayers for punitive damages. By 1980, punitive damages counts were appearing in over 27% of all such actions filed against Ford. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. of Chi. L. Rev. 1, 54 n.258 (1982). The impact of the increasing demands for punitive relief became clear in *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 174 Cal. Rptr. 348 (1981), where a jury awarded $125 million in punitive damages against Ford Motor Company after a car it had marketed with a fuel system found to be defective exploded as a result of a collision. The trial court remitted the award to $3.5 million, using standards no less indefinite than those used by the jury.

[15] The Supreme Court of Montana (in an opinion certifying Montana law to a Federal district court) recognized the uncertainty of standards in the area of punitive damages. *First Bank (N.A.)-Billings v. Transamerica Insurance Co.*, 670 P.2d 1217 (Mont. 1984). In holding that insurance coverage of punitive damages does not violate Montana's public policy, the court noted that "juries and judges typically award punitives for a broad range of conduct not often described as willful or wanton, but as merely reckless or unjustifiable." *Id.* at 1222. Refusing to preclude such insurance coverage in light of the uncertainty in the area of punitive damages, the court further stated that "fact-finders . . . wrestle with concepts like recklessness and reasonableness, such that defendants may not know that their conduct constituted presumed malice until after trial, and that a defendant in one case may never know the sting of punitive damages while another defendant in a similar case may be faced with financing a sizeable award." *Id.* at 1222.

case.[16] This unbridled discretion inevitably results in inconsistency and unpredictability—concepts foreign to our system of justice, and particularly hard to deal with in providing adequate premiums and reserves for an important type of insurance which is essentially funded by the accretion of small amounts based on recurrent wages.

The total lack of standards for awarding punitive damages in civil actions has prompted questions as to the constitutionality of the procedures for awarding these damages. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983). Because due process mandates fairness of procedures in civil cases, the absence of standards to determine the appropriate measure of punitive damages arguably conflicts with the Fifth and Fourteenth Amendments to the Constitution. Moreover, even though punitive damages actions are nominally civil, they exemplify characteristics which are inherently criminal. Unlike criminal actions, however, civil actions seeking punitive awards boast none of the constitutional protections accorded to criminal defendants, including indictment by a grand jury and proof beyond a reasonable doubt. *See*

[16] Members of this Court on several occasions have commented on the arbitrariness of punitive damages awards. *See, e.g., International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979) ("Because juries are accorded broad discretion both as to the imposition and amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial"). *Cf. Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (dissenting opinion of Justice Marshall). In *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 350 (1974), Justice Powell wrote:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

See also the dissenting opinion of Justice O'Connor in *Smith v. Wade*, 103 Sup. Ct. at 1658-59, which seems especially applicable to this case.

Smith v. Wade, 103 Sup. Ct. 1625, 1641 (1983) (dissenting opinion). Further, the vagueness of standards precludes the provision of fair warning to potential defendants as to what conduct justifies punishment.

These constitutional infirmities inhere in the Ninth Circuit's decision in the instant case. As with the law of punitive damages in general, the Ninth Circuit's opinion establishes no workable standards for assessing punitive damages in ERISA actions. This absence of standards deprives fiduciaries under the Act of the procedural safeguards necessary to protect them from the vagaries of punitive damages law. This case thus affords this Court an opportunity to eliminate the expansion of this unfair and unworkable doctrine in the field of employee benefits—an area that directly affects millions of Americans in our nation's work force. By granting the Petition and sustaining the position of the Petitioners, this Court can establish a constitutionally sound and administratively feasible rule which would eliminate arbitrariness and unpredictability in ERISA civil enforcement actions to the great benefit of the great mass of the beneficiaries of these plans.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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AUGUST, 1984

No. 84-9

In the Supreme Court
OF THE
United States

October Term, 1984

Massachusetts Mutual Life
Insurance Company, and
Cecilia Stevenson,
Petitioners,

vs

Doris Russell,
Respondent.

MOTION OF 35 MULTI-EMPLOYER TRUST FUNDS TO FILE BRIEF AS AMICI CURIAE; BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages for improper or untimely processing of benefit claims?

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No. 84-9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, AND CECILIA STEVENSON,
Petitioners,

vs.

DORIS RUSSELL,
Respondent.

MOTION OF 35 MULTI-EMPLOYER TRUST FUNDS TO FILE BRIEF AS AMICI CURIAE; BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Construction Laborers Pension Trust for Southern California, Laborers Health & Welfare Trust for Southern California, Construction Laborers Vacation Trust for Southern California, Laborers Training and Retraining for Southern California, California Field Ironworkers Pension Trust, California Ironworkers Field Welfare Plan, Carpenters Pension Trust for Southern California, Carpenters Health & Welfare Trust for Southern California, 11

County Carpenters Vacation Savings and Holiday Plan, Southern California Provision Industry Health & Welfare Trust Fund, Butchers and Provision Workers Pension Fund of Southern California, Joint Council of Teamsters No. 42 Welfare Trust, Teamsters and Food Employers Security Trust Fund, Southern California United Food and Commercial Workers Unions and Food Employers Benefit Fund, Southern California United Food and Commercial Workers Unions and Food Employers Supplementary Unemployment and Supplementary Disability Benefit Fund, Southern California United Food and Commercial Workers Unions and Food Employers Joint Pension Trust Fund, U.F.C.W. Local 711 and Retail Food Employers Benefit Fund, Retail Food Employers and U.F.C.W. Local 711 Pension Trust Fund, Retail Food Employers and Meatcutters Local 457 Benefit Fund, Food Employers and Bakery and Confectionery Workers Benefit Fund of Southern California, Valley Clerks Health & Welfare Trust Fund, Northern California Retail and Food Clerks Unions and Food Employers Joint Pension Trust Fund, Northern California Retail Clerks Unions — Employers Vacation Fund, Northern California Retail Clerks Unions and Food Employers Supplementary Payment Fund, Northern California Food Employers and Retail Clerks Unions Benefit Fund, Retail Clerks Specialty Stores Pension Fund, Northern California Area Retail Clerks Unions-Employers Welfare Fund, Northern California Pharmacists, Clerks and Drug Employers Pension Fund, Northern California Registered Pharmacists Pension Fund, Southern California Meat Cutters Unions and Food Employers Benefit Trust Fund, Southern California Meat Cutters Unions and Food Employers Pension Fund, Gemco-Retail Clerks Unions Pension Fund, Gemco-Retail Clerks Unions Welfare Trust, California Butchers Pension Trust Fund, Northern California Butchers Unions and Employ-

ers Health Trust Fund (the "Trust Funds") hereby move the Court pursuant to Supreme Court Rule 36.1 for leave to file the accompanying brief as amici curiae in support of the Petition for Writ of Certiorari filed on July 3, 1984 in U.S.S.C. 84-9.

In support of this motion, the Trust Funds state as follows:

1. This motion is necessitated by the failure of respondent Doris Russell, upon request, to give written consent to the filing of a brief by the amici applicants herein. Petitioner Massachusetts Mutual Life Insurance Co. has consented to the filing of the accompanying brief. Its letter of consent has previously been filed with the clerk of the Court.

2. The Trust Funds are multiemployer trust funds established pursuant to the provisions of Section 302(c) of the Labor Management Relations Act of 1947 as amended, 29 U.S.C. Section 186(c). All of the Trust Funds are employee benefit funds within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, *et seq.*, and are subject to federal regulation pursuant to the provisions of ERISA.

3. There are over two hundred fifty thousand participants in the Trust Funds; annually, over $40,000,000.00 is contributed to the Trust Funds on behalf of these participants.

4. Each of the Trust Funds is administered by a board of trustees; the trustees, who serve without compensation, are "fiduciaries" within the meaning of ERISA, 29 U.S.C. Section 1002(21)(A). The trustees of each Trust Fund are charged with the responsibility of administering the benefit plans promulgated by the

Trust Funds in a manner consistent with the terms of such plans and in compliance with ERISA and other applicable provisions of federal law. The trustees of the Trust Funds annually process thousands of benefit claims.

5. The Trust Funds seek leave to file the attached brief in order to make this Court aware of the grave implications of the decision of the U.S. Court of Appeals for the Ninth Circuit in *Russell v. Massachusetts Mutual Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983). The Trust Funds believe that the Ninth Circuit's holding in *Russell* that punitive damages may be awarded against the trustees of ERISA-regulated trust funds for failure to properly process benefit claims is incorrect as a matter of law, and deserves review and reversal by this Court.[1] They further believe that the practical effect of the holding in *Russell* will be to discourage all responsible individuals from serving as trustees of ERISA-regulated benefit plans, because such service would expose them to liability for punitive damages for which they may not obtain insurance and for which, in some circumstances, they may not seek reimbursement from the trust funds. The Trust Funds further believe that the ultimate impact of the Ninth Circuit's decision will be to undermine the financial stability of ERISA-regulated trust funds, in ways described in detail in the accompanying brief.

6. These amici curiae are in a unique position to advise the Court with regard to the implications of the *Russell* decision, because of their intimate familiarity

[1]*Russell* involved two single-employer employee benefit plans. But the across-the-board rule announced by the Ninth Circuit regarding liability for punitive damages would apply to fiduciaries of multiemployer trust funds, as well.

with the role of fiduciaries in the handling of employee benefit claims in ERISA-regulated employee benefit trust funds.

WHEREFORE, the Trust Funds respectfully request that they be granted leave to file the accompanying brief as amici curiae.

Dated: August 1, 1984

Respectfully submitted,

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BRIEF OF THIRTY-FIVE EMPLOYEE BENEFIT TRUST FUNDS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

NOW COME the Amici Curiae, Construction Laborers Pension Trust for Southern California, Laborers Health & Welfare Trust for Southern California, Construction Laborers Vacation Trust for Southern California, Laborers Training and Retraining Trust for Southern California, California Field Ironworkers Pension Trust, California Field Ironworkers Welfare Plan, Carpenters Pension Trust for Southern California, Carpenters Health & Welfare Trust for Southern California, 11 County Carpenters Vacation Savings and Holiday Plan, Southern California Provision Industry Health & Welfare Trust Fund, Butchers and Provision Workers Pension Fund of Southern California, Joint Council of Teamsters No. 42 Welfare Trust Fund, Teamsters and Food Employers Security Trust Fund, Southern California United Food and Commercial Workers Unions and Food Employers Benefit Fund, Southern California United Food and Commercial Workers Unions and Food Employers Supplementary Unemployment and Supplementary Disability Benefit Fund, Southern California United Food and Commercial Workers Unions and Food Employers Joint Pension Trust Fund, U.F.C.W. Local 711 and Retail Food Employers Benefit Fund, Retail Food Employers and U.F.C.W. Local 711 Pension Trust Fund, Retail Food Employers and Meatcutters Local 457 Benefit Fund, Food Employers and Bakery and Confectionery Workers Benefit Fund of Southern California, Valley Clerks Health & Welfare Trust Fund, Northern California Retail and Food Clerks Unions and Food Employers Joint Pension Trust Fund, Northern California Retail Clerks Unions-Employers Vacation Fund, Northern California Retail Clerks Unions and Food Employers Supplementary Payment Fund, Northern California Food Employers and

Retail Clerks Unions Benefit Fund, Retail Clerks Specialty Stores Pension Fund, Northern California Area Retail Clerks Unions-Employers Welfare Fund, Northern California Pharmacists, Clerks and Drug Employers Pension Fund, Northern California Registered Pharmacists Pension Fund, Southern California Meatcutters Unions and Food Employers Benefit Trust Fund, Southern California Meatcutters Unions and Employers Pension Fund, Gemco-Retail Clerks Unions Pension Fund, Gemco-Retail Clerks Unions Welfare Trust, California Butchers Pension Trust Fund, and Northern California Butchers Unions and Employers Health Trust Fund (the "Trust Funds") and submit this brief in support of the Petition for Writ of Certiorari in No. 84-9.

I.

INTEREST OF THE AMICI CURIAE

A statement describing the Trust Funds and their interest in this case is set forth in the accompanying motion requesting leave to file this brief as amici curiae.

II.

SUMMARY OF ARGUMENT

1. The Court should grant certiorari in this case to resolve the conflict among the circuit courts and district courts regarding the availability of punitive damages in actions brought by participants and beneficiaries under Sections 409 and 502 of ERISA.

2. As a matter of statutory construction, the U.S. Court of Appeals for the Ninth Circuit erred in concluding that punitive damages may be sought by claimants who allege that the fiduciaries of employee benefit plans improperly processed their benefit claims.

    a. Neither the text of ERISA nor its legislative history supports the conclusion that punitive damages may be awarded in such cases.

    b. As a matter of public policy, the courts should not engraft a right to punitive damages on the existing statutory scheme, which provides full relief to all claimants.

    c. The traditional rationales which support the award of punitive damages in non-ERISA actions are absent in cases brought by claimants under Sections 409 and 502 of ERISA.

3. Considerations of public policy overwhelmingly militate against the award of punitive damages in cases seeking relief under Sections 409 and 502 of ERISA.

    a. As a practical matter, no responsible individual will agree to act as a trustee of an employee benefit plan if the *Russell* decision is upheld. Such trustees receive no compensation for their service, but they would nevertheless be exposed to liability for punitive

damages; in most jurisdictions, they will be unable to obtain insurance to protect themselves against direct liability for such damages. Actively discouraging the participation of capable people as trustees of employee benefit plans runs counter to the principal purpose of ERISA, which is to insure responsible fiduciary administration of such plans.

b. Although trustees of employee benefit plans may, in certain limited circumstances, be able to obtain indemnification from their funds against punitive damage claims, the cost of defending such claims will be a significant drain on the resources of the plans. Both ERISA and the subsequent Multi-employer Pension Plan Amendments Act of 1980 were enacted, in large part, because of Congress' recognition that employee benefit plans already have severe financial difficulties.

c. Because punitive damages are an open-ended type of remedy, and because the *Russell* decision invites each benefit claimant to "tack on" a claim for punitive damages in every suit filed against an employee benefit trust, the liability of the trustees will become immeasurable.

III.

REASONS THE WRIT SHOULD ISSUE

A. Certiorari Should Issue in Order to Resolve the Conflict Among Lower Courts Regarding the Availability of Punitive Damages

The Petitioner has already called this Court's attention to the fact that the Ninth Circuit's decision in *Russell* squarely conflicts with the Eighth Circuit's holding in *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981) that punitive damages are unavailable in actions seeking relief under

Section 502 of ERISA. (Petition, pp. 6-7). Both the Petition for Writ of Certiorari and the opinion of the Ninth Circuit in *Russell* contain an extensive listing of conflicting lower court decisions. *See Petition*, pp. 7-8; *Russell, supra*, 722 F.2d at 491. These decisions make it clear that the lower courts have been unable to develop any consensus regarding the propriety of punitive damages claims under ERISA; a ruling from this Court on the punitive damages question is the only available means for resolving the issue.

No purpose would be served by reserving the question for consideration in a later case. More than twenty lower courts have already considered the punitive damages issue, and reached hopelessly inconsistent results. In these circumstances, the guidance of this Court is urgently needed.

The extent of the doctrinal disagreement between the lower courts is underscored by the recent decision of the U.S. Court of Appeals for the Seventh Circuit in *Bittner v. Sadoff and Rudoy Industries*, 728 F.2d 820 (1984). While the *Dependahl* and *Russell* decisions both acknowledge a split of authority on the issue of whether punitive damages are recoverable for a violation of ERISA, the Seventh Circuit's opinion in *Bittner* flatly states that a plaintiff's "misconception" that he might recover punitive damages for an alleged ERISA violation "could hardly have been reasonable . . ." 728 F.2d at 826.

Many multiemployer trust funds operate on a regional basis, within the jurisdiction of more than one federal circuit. The conflicting views of the Ninth, Eighth and Seventh Circuit Courts of Appeal regarding the availability of punitive damages under ERISA means that the trustees of such funds are exposed to markedly different levels of liability, depending on where suit is brought. Uniform rules for the administration of ERISA-regulated trust funds was one of the principal concerns of Congress when ERISA was en-

acted; indeed, it was this interest in uniformity which led to the inclusion of Section 514(a) of ERISA, 29 U.S.C. Section 1144(a), which preempts state laws insofar as they relate to ERISA-regulated employee benefit trusts; *see Shaw v. Delta Airlines, Inc.*, — U.S. —, —, n.20, 103 S.Ct. 2890, 2901, n.20 (1983).

Until this Court provides a definitive answer to the issue raised in this case, plaintiffs will be encouraged to "forum shop" for a court which takes the broadest view of the remedies available under Sections 409 and 502 of ERISA.

B. As a Matter of Statutory Construction, the Ninth Circuit Erred in Holding That Punitive Damages are Recoverable Under Sections 409 and 502 of ERISA

1. The Plain Language of the Statutes and the Legislative History Do Not Support the Inference that Punitive Damages are Available

As this Court has repeatedly held, the starting point for construing federal statutes is always the statutory language itself; *see, e.g., Ernst and Ernst v. Hochfelder,* 425 U.S. 185, 197 (1976); *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 558 (1979). In its opinion in *Russell,* the Ninth Circuit quotes portions of Sections 409 and 502 of ERISA, but does not attempt to parse the statutes to determine whether, by their literal terms, they afford a basis for awarding punitive damages. 722 F.2d at 490-491[1]

The *Russell* opinion notes that Section 409(a) provides that a fiduciary "shall be subject to such . . . equitable or

[1]The discussion of punitive damages in the *Russell* opinion does not specify precisely which provisions of ERISA the court believes would support a claim for punitive damages; *Russell, supra,* 722 F.2d at 490-492. The cases cited in the discussion in *Russell* refer to Sections 409, 410 and various portions of Section 502 of ERISA. The failure to specify the statutory source of the right to claim punitive damages makes the court's analysis all the more puzzling.

remedial relief as the court may deem appropriate, including removal of such fiduciary,"[2] and that Section 502(a)(2) permits the Secretary of Labor, or a participant, beneficiary or fiduciary to seek "appropriate relief under Section 1109 of this title." 722 F.2d at 488.

Neither of these statutory provisions contain any language which would suggest that Congress thought that punitive damages would be a form of "appropriate relief."

To justify its conclusion that punitive damages should be available as a remedy for ERISA violations, the Ninth Circuit's opinion notes that the Senate and House Committee reports on ERISA show that the Act was intended to provide "the full range of legal and equitable remedies available in both state and federal courts."[3] But the language quoted by the Court begs the question of what the "range" of remedies ought to be in an action such as *Russell.*[4] Suits by beneficiaries of employee benefit plans are fundamentally actions in contract. The accepted rule is that actions for breach of contract do not give rise to claims for punitive damages. *See Restatement (2nd) of Contracts,* Section 369 (Tentative Draft no. 14, March, 1979).

Moreover, Section 502(a)(3) of ERISA, 29 U.S.C. Section 1132(a)(3) contains language suggesting that Congress

[2]As Petitioner states, the language of Section 409 of ERISA indicates that the rights provided therein are bestowed upon the benefit plan itself, not upon individual beneficiaries. (*See* Petition p. 9).

[3]722 F.2d at 491, citing H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 17, reprinted in 1974 U.S. Code Cong. and Ad. News, 4639, 4655, Sen Rep. No. 93-127, 93d Cong., 1st Sess. 35, reprinted in 1974 U.S. Code Cong. and Ad. News, 4838, 4871.

[4]The *Russell* opinion points to the reference to "sanctions" in Section 1 of ERISA, 29 U.S.C. Section 1001(b), as evidence of Con-

(Footnote continued on next page)

intended disappointed benefit claimants to be limited to equitable and injunctive relief.[5] Section 502(a)(3) authorizes a beneficiary to bring an action "to enjoin any act or practice which violates any provision of this sub-chapter or the terms of the plan or (B) to obtain *other appropriate equitable* relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . ." [Emphasis supplied]. Courts which have considered the issue have concluded that suits by beneficiaries under Section 502(a)(1)(B) and 502(a)(3) to obtain plan benefits are equitable, rather than legal, in nature; *see, e.g., Wardle v. Central States, Southeast and Southwest Areas*

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gress' intent to provide for the imposition of punitive damages against fiduciaries. But ERISA contains its *own* "sanctions," including removal of fiduciaries (Section 409(a)), restitution (*Id.*) and monetary fines (Sections 501 and 502(c)). There is no reason to suppose that Congress intended fiduciaries to be subject to "sanctions" *in addition* to those explicitly set forth in ERISA.

Cf. Green v. Wolf Corporation, 406 F.2d 291, 303 (2d Cir. 1968) [punitive damages not recoverable for a violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78(j)(b) since, *inter alia,* "the Securities Exchange Act of 1934 contains provisions imposing criminal penalties on violators"].

[5]Participants and beneficiaries of multiemployer benefit plans may also have a cause of action under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 185(a), when plan benefits are wrongfully denied. *See, e.g., Rehmar v. Smith*, 555 F.2d 1362 (9th Cir. 1976); *Maness v. Williams*, 513 F.2d 1264 (8th Cir. 1975). Many lower courts have held that actions under Section 301 do not give rise to a claim for punitive damages; *see, e.g., Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO v. Michaelson's Food Services, Inc.*, 545 F.2d 1248, 1254 (9th Cir. 1976); *Badon v. General Motors Corporation*, 679 F.2d 93 (6th Cir. 1982); *Sanabria v. International Longshoremen's Association Local 1575*, 597 F.2d 312, 314 (1st Cir. 1979).

Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980); *cert. denied*, 499 U.S. 1112 (1981) ["We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable." 627 F.2d at 829] Punitive damages are almost universally considered to be a form of legal, rather than equitable, relief. *See, e.g., Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982).

An analogous statutory construction has been made by the courts in interpreting Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) - 5(g). That statute provides that a court, upon a finding of liability, may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." The courts have held, with near unanimity, that this language does not authorize the award of punitive damages; *see Shah v. Mt. Zion Hospital and Medical Center,* 642 F.2d 268, 272 (9th Cir. 1981); *DeGrace v. Rumsfeld,* 614 F.2d 796, 808 (1st Cir. 1980); *Harrington v. Vandalia-Butler Board of Education,* 585 F.2d 192, 194 (6th Cir. 1978), *cert. denied,* 441 U.S. 392 (1979); *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976). By parity of reasoning, punitive damages also should not be available under the similar provisions of Section 502 of ERISA.

2. The Court Should Not Engraft a Right to Punitive Damages Onto the Existing Statutory Scheme

The Ninth Circuit's decision in *Russell* ignores this Court's repeated warnings to lower courts not to gratuitously expand detailed statutory remedial schemes. The remedial scheme set forth in ERISA is complex and extensive; there is simply no basis for the assumption that Congress intended the courts to add additional remedies:

"The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97 (1981). *See also Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19:

"It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

Amici have searched the legislative history in vain for any indication that Congress expected punitive damages would be awardable under Section 502. So far as amici can ascertain, there are no statements in the record which directly authorize such damages. ERISA is not an act which was drafted in haste; *see generally* Legislative History of The Employee Retirement Income Security Act of 1974 (Committee print compiled by the Senate Committee on Labor and Public Welfare). It is highly improbable that Congress intended the extraordinary remedy of punitive damages to be available to disappointed benefit claimants bringing suit under Section 502, but simply "forgot" to mention it in both the statute and its legislative history.

3. The Absence of a Rationale for Punitive Damages

When ambiguity exists with regard to whether punitive damages may be awarded, this Court has frequently looked to considerations of public policy to determine whether such damages are available. *See, e.g., Smith v. Wade,* — U.S —, 103 S.Ct. 1625 (1983); *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979); *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981). The Ninth Circuit's decision in *Russell* betrays no serious effort

to balance the competing policy considerations which are traditionally weighed in determining whether punitive damages should be permitted.

Moreover, none of the traditional public policy rationales for permitting punitive damages would appear to apply to claims by beneficiaries under Section 502 of ERISA.

This Court has often stated that punitive damages are designed to punish and deter outrageous conduct. *Smith v. Wade,* — U.S. —, —, 103 S.Ct. 1625, 1636 (1983). It is extremely difficult to ascertain how "punishment" of fiduciaries will further any legitimate purpose of ERISA. As already noted, the trustees of mulitiemployer plans serve without compensation,[6] they derive no material benefit from the grant or denial of any benefit claim by a trust fund participant. In such a context, it is difficult to imagine that a trustee would engage in "outrageous" conduct. If the trustee fails to perform his obligations in a timely manner, or according to the trust provisions, injunctive relief may be obtained from a federal court to compel him to do so. *See* ERISA Section 502(a)(3), 29 U.S.C. Section 1132(a)(3). If the trustee's conduct constitutes a breach of fiduciary duty, he may be permanently removed. *See* ERISA Section 409, 29 U.S.C. Section 1109. In these circumstances, the traditional concepts of "punishment" and "deterrence" would appear to have little utility. A trustee's dereliction of an ERISA-imposed duty entitles a trust participant to prompt and effective injunctive and equitable judicial relief.

A second policy rationale for the imposition of punitive damage awards arises in cases where the defendant may derive great profit from outrageous conduct. *See, e.g., Toole v. Richardson-Merrell, Inc.,* 251 Cal.App.2d 689, 698 (1967). In such circumstances, the courts reason, the de-

[6]ERISA Section 408(c)(2); 29 U.S.C. Section 1108(c)(2).

fendant may find it financially attractive to run the risk of paying more general damages for wrongful conduct, since such damages will be small in comparison to the profits such conduct generates; punitive damages may be the only effective tool for curtailing such conduct. But no such consideration is present here. The trustees do not profit from the grant or denial of individual benefit claims, and have no prospect of realizing any financial gain from administration of an employee benefit plan.

Several states recognize a third public policy rationale for the award of punitive damages. In such jurisdictions, punitive damages may be granted because the "American rule" generally precludes successful plaintiffs from recovering attorneys' fees. *See*, Ghiardi and Kircher, *Punitive Damages*, § 2.11 (Callaghan 1983). That consideration is not present in suits brought under Section 502 of ERISA, since federal courts will have the discretion to award attorneys' fees to a successful claimant in appropriate cases. ERISA Section 502(g)(1), 29 U.S.C. Section 1132(g)(1).

The *Russell* opinion implies that federal courts might "borrow" principles of state law in evaluating punitive damage claims under Section 502 of ERISA. 722 F.2d at 491. The difficulty with this approach is that the state courts are in wide disagreement over the availability of punitive damages. Some states, such as Connecticut and Michigan, appear to view punitive damages as compensatory in nature; *see, e.g., Collend v. New Canaan Water Co.*, 155 Conn. 477 (1967) [Connecticut law]; *National Semiconductor v. Allendale Mutual Insurance Co.*, 549 F.Supp. 1195 (D. Conn. 1982) [same]; *Willett v. Ford Motor Co.*, 400 Mich. 65 (1977) [Michigan law]; *Postill v. Booth Newspapers, Inc.*, 188 Mich.App. 608 (1982) [same]. Other states, such as California, view punitive damages as a means of

punishment and deterrence of future misconduct; *see, e.g.*, California Civil Code Section 3294. Still other states, such as Massachusetts and Louisiana, do not permit an award of punitive damages at all, except in narrow categories of cases where they are specifically authorized by statute, *see, e.g., Schiller v. Strangis*, 540 F.Supp. 605 (D. Mass. 1982) [Massachusetts law]; *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1295 (5th Cir. 1982) [Louisiana law.]

To the extent that the *Russell* opinion suggests that state law doctrines may furnish guidance on the awardability of punitive damages, it invites federal courts to thread their way through a maze of hopelessly inconsistent and conflicting state doctrines. Such a course is grossly inconsistent with Congress' desire to provide for uniformity in the administration of ERISA-regulated trust funds.

C. As a Matter of Public Policy, Punitive Damages Should Not be Recoverable for ERISA Violations

Amici have already noted the conspicuous absence of any legislative history which would countenance the recovery of punitive damages against fiduciaries for ERISA violations. In addition, there are positive considerations of public policy which militate against the availability of such damages. The following is a brief discussion of salient considerations:

1. Impact on Trustee Service

The most dramatic and obvious result of the Ninth Circuit's decision in *Russell* will be to cause responsible individuals to refuse to serve as trustees of employee benefit plans. The possibility of being personally liable for paying punitive damage awards without predictable limits is

enough to discourage any prudent individual from agreeing to serve as a trustee of an employee benefit plan.[7]

In many jurisdictions, it appears that the trustees can not obtain any insurance which would protect them from a punitive damage award. As a matter of public policy, the states of California, Illinois, Missouri, New York, New Jersey, Florida, Virginia and Colorado forbid defendants from obtaining insurance reimbursement for sums awarded as punitive damages. *See, e.g., Northwestern National Insurance Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962) [applying Florida and Virginia law]; *Hartford Accident and Indemnity Co. v. U.S. Concrete Pipe Co.*, 369 So.2d 451 (Fla.App. 1979) [Florida law]; *City Products Corp. v. Globe Indemnity Co.*, 88 Cal.App.3d 31 (1979) [California law]; *Ford Motor Co. v. Home Insurance Co.*, 116 Cal.App.3d 374 (1981) [same]; *Hartford Accident and Indemnity Co. v. Village of Hempstead*, 40 N.Y.2d 218 (1979) [New York law]; *Brown v. Western Casualty and Surety Co.*, 484 P.2d 1252 (Col.App. 1971) [Colorado law]; *Crull v. Gleb*, 382 S.W.2d 17 (Mo.App. 1964) [Missouri law] *Variety Farms v. New Jersey Manufacturers Insurance Co.*, 172 N.J.Super. 10, 410 A.2d 696 (1980) [New Jersey law]; *Beaver v. Country Mutual Insurance Co.*, 95 Ill.App.3d 1122, 420 N.E.2d 1058 (1981 [Illinois law].

[7]Permitting disappointed benefit claimants to seek punitive damages against fiduciaries of employee benefit trusts also raises the specter of claims founded on theories of vicarious liability. In large employee benefit trust funds, much of the day-to-day claims administration work is performed by nonfiduciary employees, who are supervised by and report to the plan's fiduciaries. As a practical matter, the plain fiduciaries cannot review every minute detail of plan administration carried out by such staff personnel. Yet the rule of *Russell* would suggest that plan fiduciaries may be sued by disappointed benefit claimants who are displeased with the way in which staff members have processed their claims. Such "vicarious liability" claims have met with harsh criticism from legal commentators; *see, e.g.* Prosser, *Torts* (4th Ed.), p. 12.

Given the possibility that service as a trustee might result in a punitive damage award for which the trustee would have no protection, it taxes the imagination to envision any intelligent individual accepting such a position, especially in view of the fact that the trustees receive no compensation for their services.

2. Impact on Costs of Administration

As the Ninth Circuit opinion in *Russell* notes, trustees have limited rights to indemnification under section 410 of ERISA, 29 U.S.C. Section 1110. 722 F.2d at 490, n. 8. The principal mechanism which Section 410 permits employee benefit plans to utilize to protect fiduciaries is the purchase of insurance. As noted above, in many jurisdictions insurance is not available to cover claims for punitive damages. But even if one were to assume that Section 410 would permit employee benefit plans to fully protect their trustees, the result would be far from desirable. Such protection would be an extra cost to the plan, and thus a drain on plan resources. One of the principal purposes of ERISA and subsequent amendments added by the Multiemployer Pension Plan Amendments Act of 1980 was to strengthen the financial underpinning of employee benefit plans; *see, e.g., Nachman v. Pension Benefit Guaranty Corporation*, 446 U.S. 395 (1980); *Peick v. Pension Benefit Guarantee Corp.*, 724 F.2d 1247, 1253 (7th Cir. 1983); *cert. denied*, — U.S. — 104 S.Ct. — (1984). It is surely contrary to the purpose of ERISA to saddle employee benefit plans with open-ended liabilities which go beyond making an employee whole. Providing adequate protection against punitive damage claims, either through the purchase of insurance or through direct indemnification of fiduciaries, is certain to significantly increase the costs of administering em-

ployee benefit plans, in contravention of ERISA's clear intent.[8]

Furthermore, if punitive damages are permitted, fiduciaries may be forced to defend themselves against a string of *seriatim* punitive damage claims brought by individual participants, each complaining of the same incident of misconduct. Several circuit courts have noted that such potential multiple punitive damage recoveries can be financially ruinous to a defendant; *see, e.g., de Haas v. Empire Petroleum Company,* 435 F.2d 1223, 1231 (10th Cir. 1971); *Globus v. Law Research Service, Inc.,* 418 F.2d 1276, 1285 (2d Cir. 1969); *Roginsky v. Richardson-Merrell, Inc.,* 378 F.2d 832 (2d Cir. 1967).

Finally, if trustees of multiemployer funds are potentially liable for punitive damages for mishandling of benefit claims, the substantial *in terrorem* effect of such exposure will have a deleterious effect on the administration of ERISA-regulated employee benefit plans.[9] Many unmeritorious claims may be paid in full or settled, simply to avoid the exposure to open-ended liability for punitive damages.

[8]In *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 267 (1981), this Court stated that "an award of punitive damages, against a municipality 'punishes' only the taxpayer, who took no part in the commission of the tort." By the same token, an award of punitive damages against the fiduciaries of a trust fund really "punishes" only the participants because (1) responsible individuals will not be willing to serve as fiduciaries unless they are insured or indemnified against punitive damage awards; and (2) if the trust must indemnify the trustees against punitive damages, or purchase insurance for them, the cost is ultimately borne by the trust beneficiaries themselves.

[9]In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974) this Court held that punitive damages could not be awarded against a publisher of a defamatory article because "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship . . ." The award of punitive damages against the trustees of the employee benefit plans will have the same "chilling" effect on their efficient administration of such plans.

3. The Unlimited Nature of Punitive Damage Liability

The authorities appear to be in universal agreement that the grant of a punitive damage award is a discretionary act of the trier of fact; *see, e.g., Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910 (1978); Prosser, *Torts,* (4th ed.) pp. 13-14; *Central Microfilm Service v. Basic/Four Corporation,* 688 F.2d 1206 (8th Cir. 1982.)[10]

Because of the wide discretion which the trier of fact enjoys in setting an award of punitive damages, there is no practical way accurately to determine, in advance of trial, the extent of a defendant's exposure to such an award.[11]

The Ninth Circuit has attempted to limit the circumstances in which such an award will be available by stating that punitive damages may only be recovered where there is "a showing that the fiduciary, in carrying out its duties and responsibilities under the Act, acted with actual malice or wanton indifference to the rights of a participant or beneficiary." 722 F.2d at 492. But terms such as "wanton indifference" are so nebulous that the trier of fact is given nearly unlimited range in determining whether to award such damages.

[10]The Second Circuit has referred to "huge and perhaps capricious punitive damages which some juries have awarded." *Green v. Wolf Corporation,* 406 F.2d 291, 303 (1968).

[11]As this Court has noted, "In most jurisdictions jury discretion over the amounts awarded [as punitive damages] is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). Commentators have also remarked on the lack of uniform standards for the award of punitive damages: "The law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms." Ellis, *Fairness and Efficiency in the Law of Punitive Damages,* 56 So.Cal.L.Rev. 1, 52-53 (1982).

Other courts have met with little success in attempting to crystallize the standards to be employed in determining whether punitive damages should be assessed.[12]

Finally, this Court has noted that, in the absence of some compelling purpose, punitive damages are merely a "windfall" to a fully compensated plaintiff; *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). The court's characterization of punitive damages in *City of Newport* applies with full force to the issue presented by the Petition in this case. Section 502 of ERISA provides ample make-whole remedies to trust fund beneficiaries; any "smart money" they obtain through punitive damage awards is a bonus at the expense of the trust fund, its fiduciaries, and the fund's other beneficiaries.

The absence of clear standards for the award of punitive damages adds an undesirable burden to those already shouldered by trust fiduciaries, with no clear benefit in exchange.

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[12]This Court has recently taken note of the diverse range of touchstone phrases used by lower courts to analyze punitive damage claims, and stated that the variation in standards "was exacerbated by the ambiguity and slipperiness of such common terms as 'malice' and 'gross negligence'" *Smith v. Wade*, — U.S. —, 103 S.Ct. 1625, 1631 (1983). *See, e.g., Schwartz v. Sears, Roebuck & Co.*, 669 F.2d 1091 (5th Cir. 1982) [punitive damages justified where there was an "entire want of care which would raise the belief that the act or omission complained of was the result or consequence of indifference to the right or welfare of the person or persons affected by it."]; *Silberg v. California Life Insurance Co.*, 11 Cal.3d 452 (1974) [to be liable for punitive damages, the defendant "must act with the intent to vex, injure or annoy, or with a consequent disregard of the plaintiff's rights."]; *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978) [punitive damages available "only where the wrong was inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness or malice."]

IV.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Dated: August 1, 1984

Respectfully submitted,

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No. 84-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF FOR ALASKA FISHERMEN'S UNION—SALMON CANNERS PENSION TRUST, ALASKA FISHERMEN'S UNION—SALMON CANNERS WELFARE TRUST, ALASKA PLUMBING & PIPEFITTING INDUSTRY PENSION TRUST FUND, MONTANA TEAMSTER EMPLOYERS TRUST, NATIONAL SHOPMEN PENSION FUND, NORTHWEST METAL CRAFTS TRUST FUND, OREGON TEAMSTER EMPLOYERS TRUST, PRINTING SPECIALTIES AND PAPER PRODUCTS JOINT EMPLOYER AND UNION HEALTH AND WELFARE FUND, RETAIL CLERKS PENSION TRUST, RETAIL CLERKS WELFARE TRUST, SOUTHERN CALIFORNIA LUMBER INDUSTRY HEALTH AND WELFARE FUND, SOUTHERN CALIFORNIA LUMBER INDUSTRY RETIREMENT FUND, AND SPOKANE AREA HOTEL AND RESTAURANT EMPLOYEES TRUST FUND

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The above-captioned movants hereby respectfully move this Court, pursuant to Rule 36.1 of the Supreme Court Rules, for leave to file the attached brief amici curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the movants arises because they are multiemployer pension and health and welfare plans organized under the authority of the Taft-Hartley Act and the Employee Retirement Income Security Act (ERISA).

The Alaska Fishermen's Union—Salmon Canners Pension Trust is a pension plan with 1,191 participants and 13 contributing employers. It received 40 claims during its last reporting year. The Alaska Fishermen's Union—Salmon Canners Welfare Trust is a health and welfare plan with 1,122 participants and 13 contributing employers. It received 893 claims during its last reporting year. The Alaska Plumbing & Pipefitting Industry Pension Trust Fund is a pension plan with 1,357 participants and 200 contributing employers. It received 49 claims during its last reporting year. The Montana Teamster Employers Trust is a health and welfare plan with 1,904 participants and 179 contributing employers. It received 28,600 claims during its last reporting year. The National Shopmen Pension Fund is a pension plan with 17,000 participants and 283 contributing employers. It received 480 claims during its last reporting year. The Northwest Metal Crafts Trust Fund is a health and welfare plan with 5,695 participants and 139 contributing employers. It received 20,000 claims during its last reporting year. The Oregon Teamster Employers Trust is a health and welfare plan with 17,600 participants and 993 contributing employers. It received 58,200 claims during its last reporting year. The Printing Specialties and Paper Products Joint Employer and Union Health and Welfare Fund is a health and welfare plan with 8,400 participants and 126 contributing employers. It received 102,000 claims during its last reporting year. The Retail Clerks Pension Trust is a pension plan with 25,153 participants and 738 contributing employers. It received 258 claims during its last reporting year. The Retail Clerks Welfare Trust is a welfare plan with 17,100 participants and 667 contributing employers. It received 222,672 claims during its last reporting year. The Southern California Lumber Industry Health and Welfare Fund is a health and welfare plan with 8,200 participants and 560 contributing employers. It received 42,000 claims during its last reporting year. The Southern California Lumber Industry Retirement Fund is a pension plan with 7,600 participants and 460 contributing employers. It received 420 claims during its last reporting year. The Spokane Area Hotel and Restaurant Employees Trust Fund is a health and welfare plan with 659 participants and 25 contributing employers. It received 4,263 claims during its last reporting year. Together, these plans processed 479,775 claims during their last reporting year.

The movants seek to file a brief in this matter because of the important public issues that are raised by the petition. This case has extraordinarily severe implications for the administration and financial well-being of all employee benefit plans. Petitioners, who are a single employer plan and an employee of the plan sponsor, have raised these issues from the perspective of single employer plans. The movants seek leave to inform the court of the particularly severe consequences which the Ninth Circuit's ruling will have for multiemployer employee benefit plans.

The Ninth Circuit ruled that fiduciaries of employee benefit plans may, under ERISA, be personally liable to a plan participant or beneficiary for punitive or compensatory damages for improper or untimely processing of claims. This ruling, if not reversed, will profoundly alter the administration of multiemployer plans. The

ruling is inconsistent with the plain language of ERISA and with the holdings of other circuits.

Respectfully submitted,

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act a fiduciary of an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive or compensatory damages for improper or untimely processing of claims?

PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company*

Cecilia Stevenson

Doris Russell

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* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

MML Blend Investment Company, Inc.

MML Equity Investment Company, Inc.

MML Managed Bond Investment Company, Inc.

MML Money Market Investment Company, Inc.

MML Bay State Life Insurance Company

MassMutual Corporate Investors, Inc.

MassMutual Income Investors, Inc.

MassMutual Mortgage and Realty Investors

MassMutual Liquid Assets Trust

Maslif One & Co.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF IN SUPPORT OF PETITIONER ALASKA FISHERMEN'S UNION— SALMON CANNERS PENSION TRUST, ALASKA FISHERMEN'S UNION— SALMON CANNERS WELFARE TRUST, ALASKA PLUMBING & PIPEFITTING INDUSTRY PENSION TRUST FUND, MONTANA TEAMSTER EMPLOYERS TRUST, NATIONAL SHOPMEN PENSION FUND, NORTHWEST METAL CRAFTS TRUST FUND, OREGON TEAMSTER EMPLOYERS TRUST, PRINTING SPECIALTIES AND PAPER PRODUCTS JOINT EMPLOYER AND UNION HEALTH AND WELFARE FUND, RETAIL CLERKS PENSION TRUST, RETAIL CLERKS WELFARE TRUST, SOUTHERN CALIFORNIA LUMBER INDUSTRY HEALTH AND WELFARE FUND, SOUTHERN CALIFORNIA LUMBER INDUSTRY RETIREMENT FUND, AND SPOKANE AREA HOTEL AND RESTAURANT EMPLOYEES TRUST FUND

The amici curiae respectfully submit this brief in support of the petition filed for a writ of certiorari in the above-captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983), and appears in the Appendix to the petition at pages 1a to 25a. The order of the United States District Court for the Central District of California granting petitioner's motion for summary judgment, as well as the findings of fact and conclusions of law issued in connection therewith, are unreported and appear in the Appendix to the petition at pages 26a to 32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 16, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by that Court on April 6, 1984. Appendix to petition at page 34a. The petition for writ of certiorari was docketed on July 5, 1984. The jurisdiction of this Court is invoked by petitioners pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 409, 501, 502 and 503 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1109, 1131, 1132, and 1133, and 29 C.F.R. § 2560.503-1 promulgated pursuant to ERISA Section 503. These provisions are reproduced in the Appendix to the petition at pages 35a to 84a.

STATEMENT OF THE CASE

Respondent, Doris Russell (Russell), was an employee of a California office of the petitioner, Massachusetts Mutual Life Insurance Company (Mass Mutual). Mass Mutual sponsors two employee benefit plans which provide disability benefits to eligible employees. Both plans are provided at no cost to employees and are funded by

the general assets of the company. Both plans are covered by ERISA.[1]

Russell filed a disability claim under the salary continuance plan in May, 1979, asserting that she could not work because of a back problem. Mass Mutual began payment of benefits.

In August, 1979, the claim was reviewed by Mass Mutual's Disability Committee. The Disability Committee referred Russell to an orthopedic surgeon. In September, 1979, this specialist examined Russell and concluded that, from an orthopedic perspective, she was not physically disabled. On October 17, 1979, Russell was notified that disability payments would be discontinued upon the recommendation of the Disability Committee. Russell was also advised of her right to appeal that decision to the Plan Administrator.

On October 22, 1979, Russell wrote to the Director of Group Claims (not to the Plan Administrator) and asked for additional information regarding the termination of her benefits and for an application for long-term disability benefits. She also stated her intention to appeal the termination of her disability benefits and to submit additional medical information.

On November 27, 1979, Russell wrote to the Plan Administrator concerning her appeal and submitted additional evidence, including a report from her psychiatrist which indicated that she was suffering from a psychosomatic disability with physical manifestations rather than an orthopedic disability.

The Mass Mutual Plan Administrator treated Russell's letter of November 27, 1979 as a formal appeal and referred it to the Disability Committee. Russell was examined by an independent psychiatrist, who confirmed

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[1] Petitioner Cecilia Stevenson, an employee of Mass Mutual, was Russell's supervisor at Mass Mutual. Amici Curiae accept petitioner's statement of the case, but provide a synopsis of it herein.

[2] Other employment-related claims were also asserted; the only claim addressed herein by the amici curiae is Russell's claim with respect to her disability benefits.

that Russell suffered from a psychiatric disability in a report dated February 15, 1980. On the basis of this report, the Disability Committee recommended that Russell's benefits be reinstated retroactively. The Plan Administrator adopted this recommendation and informed Russell of his decision on March 11, 1980. Payment of all benefits due was made two days later.

Although she received full benefits from both plans, Russell sued Mass Mutual in California Superior Court on December 9, 1980 for compensatory and punitive damages for the untimely and improper handling of her benefit claim,[2] which allegedly resulted in economic loss and mental anguish.[3]

After removal of the case to the United States District Court for the Central District of California on the ground that the case was governed by ERISA,[4] the District Court granted a motion by Mass Mutual for summary judgment. The court first held that all of Russell's state law claims arising from the processing of her claim for disability benefits were pre-empted by ERISA. The court then concluded that, as a matter of law, punitive and compensatory damages are not available to plan participants under ERISA. By so ruling, the court tacitly acknowledged that a plan participant only has a claim against the plan for non-payment of benefits and costs of litigation, including fees. Because Russell had been paid benefits in full, she was not entitled to any additional relief. The court found that Russell's appeal was filed on November 27, 1979 and rejected her contention

[3] Russell claimed, *inter alia*, that Mass Mutual's delay forced her husband, who was also unemployed on the grounds of disability, to cash out his retirement savings plan. Russell alleged that she and her husband lost the security of lifetime benefits. Russell also sought damages for emotional distress and claimed that her preexisting psychosomatic illness was aggravated as a result of the improper and untimely handling of her claim.

[4] Mass Mutual removed this action pursuant to 28 U.S.C. § 1441(a), alleging the existence of federal jurisdiction under 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331(a).

that she was entitled to damages because her claim had not been processed in 120 days, as required by regulations promulgated under ERISA Section 503, 29 U.S.C. § 1133. See 29 C.F.R. § 2560.503-1(h) (1983).[5]

The Ninth Circuit affirmed the District Court's holding that Russell's state law claims were pre-empted by ERISA. However, the Ninth Circuit reversed the District Court's grant of summary judgment. The appellate court held that Russell's complaint had stated a claim under ERISA for breach of fiduciary duty based on the allegedly improper or untimely handling of her appeal. The Court of Appeals determined that Russell's appeal began with her initial letter of October 22, 1979 and that Mass Mutual, therefore rendered its final determination *twelve days* beyond the 120-day limit.

The Court of Appeals went on to hold that such a claim could support an award of both compensatory and punitive damages. The appellate court based its opinion on an interpretation of ERISA Section 409, 29 U.S.C. § 1109. It held that Section 409, which expressly imposes personal liability to the plan for fiduciary breaches, also make fiduciaries personally liable to individual participants with respect to benefit claims. The Ninth Circuit is the only appellate court to have held that Section 409 authorizes punitive damages against plan fiduciaries by individual participants for denial of a benefit claim.

[5] The regulations which require benefit claims to be decided within 120 days do not provide affirmative relief. These regulations simply provide that, in the event of the plan's failure to render a decision within that time, "the claim shall be deemed denied on review." 29 C.F.R. § 2560.503-1(h)(4). The participant can then file suit under ERISA Section 502 without fear that a defense of failure to exhaust remedies can be raised.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Ruling that Punitive Damages are Available to Plan Participants and Beneficiaries Conflicts with Rulings of the Eighth Circuit and Numerous District Courts

The Ninth Circuit's holding in *Russell v. Mass. Mutual Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983) that awards of punitive damages are permissible under ERISA was subsequently restated in *Winterrowd v. Freedom & Co.*, 724 F.2d 823 (9th Cir. 1984). In the latter case, the Court affirmed an award of punitive damages against a contributing employer to a multi-employer fund. *Russell* and *Winterrowd* directly conflict with the Eighth Circuit's reasoning in *Dependhal v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), cert. denied, 454 U.S. 968 (1981), in which that court stated:

> We do not think that punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages; it could have easily so stated, as it had in other acts.

653 F.2d at 1216; see also *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984), which held that punitive damages are not available in an action for plan benefits under ERISA Section 502(a)(1)(B).

In addition to this conflict between Circuit courts, there is sharp conflict among the numerous district court decisions that address the availability of punitive damages under ERISA. These decisions are comprehensively listed at pages 7-8 of the petition, and we respectfully refer the Court to those citations.

II. The Ninth Circuit's Ruling is Inconsistent with the Statutory Scheme and Language of ERISA and Gives a Windfall Reward to Participants

ERISA specifically differentiates between remedies available to plans as a whole and to individual par-

ticipants and beneficiaries. The Ninth Circuit has completely ignored these distinctions and, in effect, has rewritten the remedial provisions of the Act.

As this court has observed, ERISA is a "comprehensive and reticulated statute" in which Congress established many detailed rules to further "the well-being and security of millions of employees and their dependents" and to remedy the numerous flaws in the private pension plan system. *Nachman Corp. v. PBGC*, 446 U.S. 356, 361 (1980), reh. denied 448 U.S. 908 (1980). Among the most significant changes wrought by ERISA were the strict rules for fiduciary behavior and the personal liability imposed upon fiduciaries for any breach of their duties. The rules of fiduciary behavior are extensive, and include the following:

> a rule which prohibits sales or exchanges between the plan and "parties in interest" and "disqualified persons" (ERISA Section 406; ERISA Section 2003);
>
> a prudent person rule which provides a standard by which fiduciaries' investment and other asset disposition decisions are judged (ERISA Section 404 (a)(1)(B));
>
> an "exclusive purpose" rule, which requires that a plan be administered with the exclusive purpose of providing benefits (ERISA Section 404(a)(1)(A));
>
> a prohibition against compensation for fiduciaries who are full time employees of unions or employers (ERISA Section 408(a)(2)); and
>
> a prohibition against any self-dealing by fiduciaries (ERISA Section 406(b)).

These fiduciary rules have one thing in common: they are obligations to the plan as a whole, rather than simply to individual participants.

All breaches of the fiduciary rules are grounds for an enforcement action against plan fiduciaries, even if the breaches do not cause monetary damage to the plan. Fiduciaries are "personally liable to make good to [the]

plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." ERISA Section 409(a), 29 U.S.C. § 1109(a). Fiduciaries are subject to removal for fiduciary breaches and to "other equitable or remedial relief" deemed appropriate by the court.

It is important to note that ERISA Section 409 provides equitable and remedial relief for fiduciary breaches *only* to plans as a whole, *not* to individual participants.[6]

Relief for individual participants and beneficiaries who have been denied benefits is exclusively pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This provision does not permit the imposition of personal liability upon fiduciaries for any compensatory or punitive damages to individual participants or beneficiaries. It limits benefit claimants to recovery of benefits due from the plan and costs of litigation, including attorneys' fees.

The different remedial provisions of Section 409 and 502 reflect the delicate balance struck by Congress among the significant purposes served by ERISA: (1) the deterrence of fiduciary malfeasance; (2) the promotion of the expansion of the private pension plan system; and (3) the securing of benefits due to individual participants and beneficiaries. Congress balanced the prophylactic effect of the imposition of personal liability upon fiduciaries as a deterrence for malfeasance against the need to promote expansion of pension plans. Congress determined that personal liability to the plan for fiduciary breaches would deter malfeasance, but that excessive imposition of personal liability (such as was created by the Ninth Circuit) would hamper creation of new plans, the expansion of existing ones, and the recruitment of plan trustees.

[6] ERISA's legislative history confirms that any recovery under Section 409 necessarily benefits the plan as a whole. See, e.g. H. Conf. Rep. No. 1280, 93d Cong., 2nd Sess. 320 (1974) (personal liability of fiduciary for losses to the plan resulting from fiduciary breach) and S. Rep. No. 127, 93d Cong., 1st Sess. 33 (1973) (personal liability of fiduciary to reimburse fund for losses resulting from fiduciary breach and to turn over any profits obtained by use of fund assets).

Congress, in balancing competing concerns clearly felt that the prophylactic measures (of personal liability) designed to deter abuses of plan resources were not an appropriate way of dealing with errors made in the processing of individual claims. Balancing the need for encouraging accuracy in individual claim processing against its policy of promoting pension plan expansion, Congress authorized full recovery of benefits due to individuals from plans as well as costs of litigation (including attorneys' fees), but did not go so far as to impose personal liability upon plan fiduciaries for either compensatory or punitive damages. Thus, ERISA deters malfeasance in the management of plans, provides remedies to individual claimants, and yet does not set up barriers to the expansion of the private pension system. This Court has previously affirmed, in similar sorts of statutes, the need for a "careful balance of individual and collective interests." *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (which case holds that punitive damages are not available for claims of breach of duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151 et seq.).

The Ninth Circuit upset the careful balance struck by ERISA without any justification. The imposition of personal liability upon plan fiduciaries for prior errors in claims processing does not significantly add to the prophylactic effect of the measures expressly provided by Congress to deter fiduciary malfeasance. Neither does it add to the ability of individual participants to secure benefits. Benefits are already well secured under the benefit recovery provisions of Section 502.[7] But, the Ninth Circuit's ruling has extremely deleterious effects on plans. It adversely alters the decision-making procedures of plan trustees and, by discouraging responsible persons from

[7] Indeed, an award of punitive damages would be a windfall to a benefit claimant.

serving as trustees, discourages the expansion of the private pension plan system. The amici curiae now turn to a discussion of these consequences as they apply to multiemployer plans.

III. The Ninth Circuit's Ruling is of Great Public Importance Because it has a Severe Adverse Impact on Multiemployer Benefit Plans and their Participants

Multiemployer plans are integral to the financial security of millions of Americans. The Ninth Circuit's ruling will injure multiemployer plan administration, deter qualified individuals from serving as plan fiduciaries, discourage the process of dispute resolution established by ERISA, and expose fiduciaries to liabilities that they cannot estimate and against which they may be unable to insure themselves. The cumulative effect of this is to undetermine the stability of multiemployer plans and thereby effectively halt their expansion.

A. The Nature and Importance of Multiemployer Benefit Plans to the Retirement Security and to the Health and Welfare Benefits of Millions of Employees

Multiemployer employee benefit plans play a vital role in the financial well-being of millions of individual workers. They enable the employees of small and medium sized companies to obtain the level of pension and health and welfare benefits only available from large plans. They permit employees who work for more than one employer in the same industry to accumulate meaningful pension benefits. They also protect pension benefits when an employer leaves the plan. Multiemployer plans support two important features of the American economy: small businesses and a mobile workforce.

Small and medium sized companies often cannot afford sophisticated and generous employee benefits such as those provided by large corporate plans. Large employee benefit plans can profit from substantial economies of scale and can also accurately reflect the science of "averages," which forms the basis of actuarial predictions. An

increase in plan size considerably reduces the risk that a plan may suffer financial adversity because its benefit claims experience does not accurately mirror statistical predictions.

Of similar importance is the need to provide a form of "portable" pension benefits. Because multiemployer pension plans generally include many employers in an industry, an employee moving from one employer in the plan to another continues to accumulate benefits without interruption. Multiemployer plans also protect pension benefits because they provide benefits to an employee even though his or her employer leaves the plan.

Congress has recognized that multiemployer plans "typically provide workers with greater retirement security than single employer plans." Senate Labor Committee Summary and Analysis of Consideration of S.1076 (April 1980) U.S. Code Cong. & Admin. News, p. 2985. Accordingly, Congress has repeatedly passed legislation to strengthen multiemployer plans. The most comprehensive effort in this regard was the Multiemployer Pension Plan Amendments Act of 1980, which amended ERISA by imposing withdrawal liability upon employers who withdraw from multiemployer pension plans. Section 3 of the Act explicitly states that it is Congressional policy to encourage the maintenance and growth of multiemployer pension plans.[8]

Multiemployer benefit plans are established through collective bargaining agreements. The Taft-Hartley Act of 1947 specifically provided for the formation of trusts to administer health and welfare and pension funds for

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[8] The 1980 Amendments to ERISA were enacted by Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980). For further discussion of Congressional policy to encourage the maintenance and growth of multiemployer pension plans, see House Ways and Means Committee Report on H.R. 3904 (Rept. 96-869, Part II, April 23, 1980) and House Labor Committee Report on H.R. 3904 (Rept. 96-869, Part I, April 2, 1980).

employees represented by labor unions in collective bargaining with management, 29 U.S.C. § 186(c)(5) and (6). The law also required such plans to be managed by trustee boards equally divided between representatives of management and of labor organizations. See *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) for a description of the functioning of such trustees. Multiemployer trustees are familiar with the particular needs of their industry and are best able to design plans to fit those needs.

Multiemployer benefit plans cover millions of American workers. Multiemployer pension plans are primarily defined benefit plans. While multiemployer pension plans represent only 3.2% of all defined benefit pension plans, they provide coverage to 20-26% of all American nonfarm workers covered by such plans.[9] In 1980, there were 1,826 multiemployer pension plans in the country, with a total of 10 million active and retired participants.[10] There were also 4,500 multiemployer health and welfare funds, of which 3,040 provided basic hospitalization and other health benefits to 8.1 million participants.[11] Multiemployer pension plans process hundreds of thousands of benefit claims each year. Multiemployer health and welfare plans process millions of claims annually. All of these claims are processed by trustees or by administrators acting on their behalf.

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[9] Cooper, Robert D., *Pension Fund Operations and Expenses (Pension Fund Operations)*, p. 21 (1980) International Foundation of Employee Benefit Plans, Inc. Brookfield, Wisconsin.

[10] Cooper, Robert D., *Pension Fund Operations*, p. 22 n.5.

[11] The other 1,460 health and welfare plans provide other benefits, such as vacation, unemployment, etc. Cooper, Robert D., *Multiemployer Health and Welfare Plan Operations and Expenses*, p. 14 n.5 (1983) International Foundation of Employee Benefit Plans, Inc. Brookfield, Wisconsin.

B. The Ninth Circuit's Ruling will Severely Injure Multiemployer Benefit Plans and their Participants because it will Deter the Prudent and Careful Administration of Such Plans

The financial well-being of multiemployer benefit plans, and of their participants and beneficiaries, is dependent upon careful, prudent and reasonable management of all aspects of the plan, including the area of benefit claims processing.

Plan trustees design benefit systems and devise and implement procedures for processing and evaluating claims. While it is, of course, important to make prompt payment of all justified claims, it is likewise important to refuse payment of claims that do not meet plan requirements. Indeed, ERISA Section 404(a)(1)(d) mandates this. If plan requirements were not scrupulously followed, plan assets would be squandered and the benefit security of all participants would be undermined. For instance, if a pension plan has a 10-year vesting provision, and is funded accordingly, the trustees must not pay benefits to a participant who has accumulated 9 years and 11 months of pension service. Plan trustees must balance the interest of the individual benefit claimant against the interest that all participants have in safeguarding the plan's assets by accurate and prudent claim administration.

ERISA safeguards individual rights by providing the right to obtain accurate data regarding plan benefits and by requiring prompt claim processing. ERISA section 503 provides that plans must provide "adequate notice" of any benefit denial, "written in a manner calculated to be understood by the participant," and that plans must provide "reasonable opportunity" for a "full and fair review" of any benefit denial.

ERISA Section 404, § 29 U.S.C. § 1104, requires that fiduciaries act prudently with respect to the plan. They must not make benefit determinations arbitrarily or capriciously. "The trustees of a . . . fund have, not only the authority, but the duty to insure that payments are

made to only those who are eligible." *Feathers v. U.M.W. Health and Retirement Funds*, 99 L.R.R.M. 2287 (D.D.C. 1978).[12] The fiduciaries of a plan must jealously guard the benefit security of *all* participants.

ERISA imposes far more severe liability for breach of fiduciary duties to the plan than for making errors in particular benefit determinations. ERISA Section 502 (a)(1)(B) 29 U.S.C. § 1132(a)(1)(B), protects the rights of individual participants by providing for full recovery of benefits due from the plan, but does not provide for any recovery from plan fiduciaries. The strongest remedy is reserved by ERISA Section 409 to fiduciary breaches against the benefit security of all participants. That section authorizes recovery from plan fiduciaries only on behalf of the plan as a whole for the benefit of the plan itself. Section 409 does *not* provide for recovery from trustees (or other fiduciaries) by individual beneficiaries.

The Ninth Circuit's interpretation of ERISA Section 409 substantially ignores the fact that fiduciary responsibility under ERISA is to the plan as a whole as well as to individual participants. Its decision, if allowed to stand, will lead plan fiduciaries to be fearful of litigation and of personal liability whenever they review claims. This very justified fear will significantly distort the entire decision making process concerning claims. Trustees will be far more likely to acquiesce in the payment of questionable claims. While the approval of one questionable claim will not likely weaken a plan, the cumulative effect of trustee acquiescences to such claims over time will have that effect.

C. The Ninth Circuit's Ruling will Deter Qualified Persons from Serving as Fund Trustees and Administrators

Multiemployer benefit plans are primarily labor-management funds that are administered by joint boards

[12] See also *Moglia v. Geogheghan*, 403 F.2d 110, 116 (2nd Cir. 1968); *Brune v. Morse*, 475 F.2d 858 (8th Cir. 1973); *Bayles v. Central States, Southeast, Etc.*, 602 F.2d 97 (5th Cir. 1979).

of labor and management trustees. Multiemployer plans are frequently administered by management trustees who work for geographically dispersed companies (many of them quite small) and by union trustees who are also frequently dispersed geographically.

Labor and management trustees generally do not get paid for their time because such payments are prohibited by ERISA Section 408(a)(2), 29 U.S.C. § 1108(a)(2). Trustees of multiemployer plans receive no institutional rewards for their service. Employer trustees must forego management of their business and may lose income because they take time to serve as trustees; union trustees must forego their organizing tasks. Multiemployer plan trustees agree to serve because of a serious commitment to employee benefit security and because of a desire to perform a service to their union members or to their employees.

Trustees are well aware that the fiduciary requirements of ERISA mandate prudent, honest and selfless plan administration. They are also aware that fiduciary breaches injurious to the fund may result in the imposition of personal liability against them to remedy any injury caused to the fund. Generally speaking, fiduciaries can fulfill their obligations and avoid breaches of fiduciary duty by carefully selecting investment managers, accountants, and administrators to perform the day-to-day administrative tasks of the fund, and by periodic review of plan reports, operations, and policies.

Prior to the decision of the Ninth Circuit in this matter, trustees did not fear that personal liability might arise from every ministerial task performed by plan employees or agents. Thus, prior to the Ninth Circuit's decision, responsible individuals with sound financial and administrative skills have been willing to serve as trustees of multiemployer funds because they could adequately perform their fiduciary duties by providing management and direction without direct involvement in claim processing details.

By drastically expanding the scope of personal liability of trustees beyond that contemplated by ERISA, the

Ninth Circuit has provided a powerful disincentive for any reasoning person from serving as trustee of a multiemployer plan. Now, the otherwise responsible, prudent trustee is personally liable for any delays or errors of judgment in routine individual claims processing. The Ninth Circuit has made it virtually impossible for the traditional multiemployer trustee to function. Trustees will fear that, unless they maintain personal involvement in daily fund activities, they will not be able to monitor their own exposure to liability. Since multiemployer trustees are generally not compensated, it will be virtually impossible to find competent labor and management trustees willing to serve in the face of such risk.

Similarly, competent individuals with administrative and financial expertise will be deterred from serving as administrators of multiemployer plans because each daily task that they perform may result in substantial personal liability.

D. The Ninth Circuit's Ruling is Injurious to the Dispute Resolution Process Favored by ERISA

ERISA Section 503, 29 U.S.C. § 1133, and regulations promulgated thereunder, favor internal administrative resolution of disputes concerning benefit claims. Section 503 requires plans to provide adequate notice and explanation of any denial of benefits and a "full and fair review" to all claimants who appeal denials of benefits. This general provision is further elaborated by regulations set forth at 29 C.F.R. § 2560.503-1.

The regulations impose certain requirements for reasonable claims procedures established by plans. Plans must provide for reasonable claim filing procedures that must be communicated to participants. If such procedures are not established, a claim is deemed filed when the participant brings it to the attention of the plan.

Plans must also provide notice and explanation of any denials of claims within 90 days, or, at the most, within 180 days if special circumstances exist. The notice must set forth (1) the reason for benefit denial; (2) the plan

provisions on which denial is based; (3) a description of any additional information or materials needed to perfect the claim; and (4) information about how to obtain a review of the denial of benefits.

Finally, plan participants must be given the opportunity to appeal denied claims to the appropriate fiduciary or to a person designated by the fiduciary. The participant must be given access to all pertinent plan documents and an opportunity to submit issues and comments in writing. The decision on review must be made promptly, usually within 60 days after receipt of the request for review, or, under special circumstances (such as the scheduling of hearing) within 120 days after receipt.

The procedures outlined above are designed to promote dispute resolution through the exchange of information by plans and participants. The procedures require a plan to disclose the reasoning behind every denial of benefits and to state if any additional information may change the results. This gives participants the opportunity to offer relevant counter arguments and to submit relevant information that might have been originally overlooked. The resulting process is an essentially nonadversarial dialogue between the plan and the participant that is designed to raise all the arguments and information pertinent to the denied claim and to avoid unnecessary litigation.

Courts have generally required claimants to exhaust their internal plan remedies before filing suit under ERISA Section 502. See e.g. *Lucas v. Warner & Swasey Company*, 475 F. Supp. 1071 (E. D. Pa. 1979); *Kross v. Western Electric Co., Inc.*, 701 F.2d 1238 (7th Cir. 1983), aff'g in part and rev'g in part 534 F. Supp. 251 (1982). This is so because the dispute resolution mechanism provided by ERISA is so well-suited for resolving disputes that are based on a misunderstanding of plan rules or on incomplete information. Because the internal dispute resolution mechanisms of plans so success-

fully accomplish their purposes, the federal courts are not overburdened by litigation of benefit claim disputes.

The case at bar is a good example of the proper functioning of internal plan dispute resolution. The participant was advised of the specific reasons for the denial of her claim, had the opportunity to, and did present, additional information, and was ultimately granted full benefits on the basis of information obtained through the dispute resolution process.

The Ninth Circuit's decision will irretrievably damage this valuable and efficient process. Since plan trustees and administrators will now be subject to litigation and to grave personal liability for the performance of even routine ministerial plan functions, they will have a tendency to be guarded and cautious when dealing with benefit denial claims. They will be hesitant to set forth all the issues frankly and will be reluctant to receive any additional information. They will also be concerned that any change in a benefit determination result may be used as evidence of impropriety. Flexibility in plan administration will inevitably be reduced, thereby resulting in even more litigation. Indeed, some participants may be encouraged to forego a settlement resolution without litigation in the hopes of obtaining a windfall award of punitive damages.

Before the Ninth Circuit's decision, litigation over benefit claims denials could only result in full payment of the disputed claim and costs. Now, such litigation also threatens unknown, potentially enormous personal liability. The change in fiduciaries' behavior resulting from this new liability concern will decrease the internal resolution of benefit claim disputes and significantly increase the volume of litigation in already burdened federal courts.

E. Compensatory and Punitive Damages are not Uniformly Awarded and are Frequently Large and Inconsistent

The compensatory and punitive damages permitted by the Ninth Circuit are entirely unpredictable in amount and may result in inconsistent, large awards.

Compensatory damages include damages for all losses and injuries sustained by a claimant whose claim has been mishandled,[13] including damages for mental anguish that is accompanied by some physical injury.[14] Mental anguish has been variously defined as nervous shock, fright, or humiliation.[15] There is no standard of law by which asserted damages of this nature can be verified or measured. The amount to be awarded is necessarily arbitrary,[16] and may amount to thousands or hundreds of thousands of dollars.

Punitive damages are even less predictable. They do not compensate the claimant for any actual injuries.[17] Punitive damages amounts are not subject to rules of any sort and are frequently arbitrary. The following recent examples of punitive damages awards in California state court litigation illustrate this point: [18]

Name of Case	Superior Court	Type of Case	Actual Damages	Punitive Damages
Triple E. Machinery v. Englebrecht	Norwalk	Embarrassment and humiliation	$ 50,000	$ 102,327
Spleker v. Senator Hotel	Sacramento	Breach of contract	$343,310	$3,117,946

[13] See 22 Am. Jur. 2d, Damages § 11, n.12.

[14] See 22 Am. Jur. 2d, Damages § 195.

[15] See 38 Am. Jur. 2d, Fright, Shock, and Mental Disturbance, § 45.

[16] See 22 Am. Jur. 2d, Damages, §§ 109, 198.

[17] See 22 Am. Jur. 2d, Damages, §§ 236, 237, 238.

[18] *Jury Verdicts Weekly*, Volumes (26) (1982), (27) (1983), and (28) (1984) Jury Verdicts Inc. Santa Rosa, California.

Name of Case	Superior Court	Type of Case	Actual Damages	Punitive Damages
Hare v. Kearney Mesa Volkswagen	San Diego	Wrongful repossession of automobile	$ 30,000	$ 275,000
Sullivan v. Kaiser Foundation Health Plan	San Diego	Failure to pay medical claim	$ 45,000	$ 400,000
Coconis v. Ins. Co. North America	San Francisco	Insurance bad faith	$ 3,500	$ 20,000
Gump v. Wells Bank	San Francisco	Breach of trust	$ 34,339	$1,000,000
Garvey v. State Farm	Sonoma	Insurance bad faith	$ 47,593	$1,110,000
Thompson v. Thompson	Sonoma	Breach of fiduciary duties—real estate	$ 17,000	$ 30,000

As is evident from these examples, no fiduciary will be able to predict the amount of his or her personal liability exposure.

The availability of insurance coverage for punitive and compensatory damages is doubtful at this time. But, even if such coverage ultimately became available, it would, no doubt, be prohibitively expensive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted in this case. Unless the Ninth Circuit's decision is reversed, growth of multi-employer plans will be effectively ended.

Respectfully submitted,

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No. 84-9

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
and CECILIA STEVENSON,
Petitioners,

vs.

DORIS RUSSELL,
Respondent.

MOTION OF BOARDS OF TRUSTEES OF THE NORTHERN CALIFORNIA CARPENTERS TRUST FUNDS, CEMENT MASONS TRUST FUNDS, LABORERS TRUST FUNDS, OPERATING ENGINEERS TRUST FUNDS AND CONSTRUCTION TEAMSTERS HEALTH AND WELFARE TRUST FUND FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary of an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of a benefit claim.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Board of Trustees of the Carpenters Health and Welfare Trust Fund for California, the Carpenters Pension Trust Fund for Northern California, the Carpenters Vacation and Holiday Trust Fund for Northern California, the Carpenters Annuity Trust Fund for Northern California, the 46 Counties Millwrights Annuity Trust Fund, the Cement Masons Health and Welfare Trust Fund for Northern

California, the Cement Masons Pension Trust Fund for Northern California, the Cement Masons Vacation/Holiday Trust Fund for Northern California, the Cement Masons Apprenticeship and Training Trust Fund for Northern California, the Laborers Health and Welfare Trust Fund for Northern California, the Laborers Pension Trust Fund for Northern California, the Laborers Vacation-Holiday Trust Fund for Northern California, the Laborers Training and Retraining Trust Fund for Northern California, the Operating Engineers Health and Welfare Trust Fund, the Pension Trust Fund for Operating Engineers, the Pensioned Operating Engineers Health and Welfare Trust Fund, the Operating Engineers and Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund and the Construction Teamsters Health and Welfare Trust Fund for Northern California (the "Northern California Trust Funds") hereby move the Court pursuant to Supreme Court Rule 36.1 for leave to file the accompanying brief as Amici Curiae in Support of the Petition for a Writ of Certiorari filed on July 3, 1984, in U.S.S.C. 84-9.

In support of this motion, the Boards of Trustees of the Northern California Trust Funds state as follows:

1. Petitioners Massachusetts Mutual Life Insurance Company and Cecilia Stevenson have consented to the filing of the accompanying brief and a letter evidencing such consent will be filed with the Clerk of the Court. Respondent Doris Russell has refused to consent to such filing.

2. The Northern California Trust Funds are collectively-bargained multiemployer employee benefit funds

established and maintained pursuant to Section 302 (c)(5) and (6) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c), (5), (6). Each of the Funds is an employee benefit plan covered by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq., commonly known as ERISA.

3. The Funds, in the aggregate, have over ninety thousand participants, who are employees, engaged in the building and construction industry in the 46 Northern Counties of California, and over five thousand contributing employers, who are also engaged in that industry.

4. Each of the Funds is governed by a Board of Trustees composed of an equal number of employer representatives and employee representatives, each of whom serves without compensation from the Funds. The members of each Board have been designated as named fiduciaries who jointly have authority to control and manage the operation and administration of the employee benefit plan maintained by the Fund. One of the duties of the Board in the exercise of this authority is to receive and consider claims to benefits under the plan and to grant or deny such claims.

5. For the reasons given in the accompanying brief the Boards of Trustees of the Funds believe that the holding of the Court of Appeals in *Massachusetts Mutual Life Insurance Company v. Russell* that the fiduciary of an ERISA plan may be held personally liable to a plan participant for punitive damages or extra-contractual compensatory relief for the untimely or

improper processing of his benefit claim will (a) discourage responsible and qualified individuals from becoming or remaining plan trustees, (b) lead to the granting of unmerited benefit claims to the detriment of plan participants and beneficiaries generally and (c) promote the litigation of claims and increase the cost of such litigation. They believe, further, that such holding evidences a lack of understanding of the manner in which multiemployer employee benefit plans operate and is unrealistic; that the holding is unfair, not only to the trustees but also to the participants and beneficiaries of such plans; and that the holding conflicts with both the express terms of ERISA and with important objectives of Congress in enacting that Act.

6. The holding in the *Russell* case has had an immediate adverse impact upon the Funds and the adverse effects of the holding are ongoing. One of the Funds, the Laborers Pension Trust Fund for Northern California, is currently defending an action by a disappointed claimant in which the members of its Board of Trustees have been included as defendants, and in which punitive damages are sought, and threats of actions for punitive damages are routinely made against others of the Funds by attorneys representing participants in claim review proceedings. The Boards of Trustees have concluded, therefore, that the interests of the Funds and their participants and beneficiaries, and the Boards' fiduciary obligations to protect and serve those interests, require that these concerns be brought to the attention of the Court at the first opportunity.

For the foregoing reasons, the Boards of Trustees of the Funds respectfully request that they be granted leave to file the accompanying brief as Amici Curiae.

Dated: August 1, 1984

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NATURE OF THE INTEREST OF THE NORTHERN CALIFORNIA FUNDS IN THE PETITION

Because of the special characteristics of multiemployer employee benefit plans in the construction industry, the holding of the Court of Appeals in this case that a fiduciary of a plan may be held personally liable to a plan participant for punitive damages or extra-contractual compensatory relief for the improper or untimely processing of his claim has a particularly devastating impact upon such a plan. The

trustees of the plan who serve as employer representatives do so more out of dedication to the industry than out of their self-interest or the special interests of their employers. The contractors and builders who participate in the plan number in the thousands, and the easy course for a contributing employer would be to let someone else undertake the burdens and responsibilities of representing the employers on the boards of trustees.

Ever since the first of the Northern California Funds were established in 1953 the employer associations that negotiate and renegotiate the collective bargaining agreements providing for the Funds have, as a general policy, appointed leading contractors or builders, or the principal officers of leading contractor or builder firms, as employer trustees of the Funds. This policy has meant that those who, through their leadership positions, have been familiar with the interests and positions of the contributing employers, including those relating to collective bargaining, have been truly representative of such employers within the meaning of Section 302(c)(5) of the Labor-Management Relations Act. The policy has contributed substantially to the growth and well-being of the Funds, which now receive annually more than $350,000,000 in employer contributions, distribute more than $320,000,000 in benefits to participants and their dependents and beneficiaries and have accumulated more than $1,700,000,000 in reserves for future pension and other benefits. The policy, however, has become increasingly difficult to maintain because of the reluctance of potential appointees to expose themselves and their families to the risk of personal liability.

While the trustees can be provided with insurance against personal liability for extra-contractual compensatory re-

lief, no insurance can be provided in California against liability for punitive damages. Further, and of more immediate concern to every trustee, is that a simple allegation and claim for punitive damages has been held by the federal courts to authorize an inquiry for discovery purposes into the net worth and personal finances of a defendant.

In *Hughes v. Groves* (W.D. Mo. 1969) 47 F.R.D. 52, the Court said (p. 55):

> "Defendant next objects to plaintiff Róbert Hughes' interrogatory 7 and Margaret Hughes' interrogatory 18, both of which in substance ask for "all assets and liabilities, jointly and severally * * * and gross earnings for last five (5) years." Defendant objects that the question is premature. *He asserts that 'more than a simple allegation and claim for punitive damages should be necessary to allow plaintiffs to discover information about defendant's finances and 'how much he is to be punished.'" The law, however, is well settled and contrary to that position.* Information regarding damages is as discoverable as is that which pertains to liability. 4 Moore's Federal Practice § 26.18, p. 1229 (1968 ed.); *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 53 S.Ct. 736, 77 L.Ed. 1449. *No prima facie showing in p[illegible]tive damages is required to justify discovery.*"[1]

See: *Miller v. Doctor's General Hospital* (W.D. Okla. 1977) 76 F.R.D. 136, 140; *Holliman v. Redman Development Corp.* (D.S.C. 1973) 61 F.R.D. 488, 491; *Coy v. Superior Court* (1962) 58 Cal.2d 210, 216-217, 23 Cal. Rptr. 393, 373 P.2d 457.

[1]Emphasis is added throughout this brief unless otherwise noted.

Some of the adverse consequences of the ruling in *Hughes v. Graves, supra*, were expressed in *Richards v. Superior Court* (1978) 86 Cal.App.3d 265, 150 Cal. Rptr. 77, where Court said (p. 271):

> "Discovery seeking financial information by reason of a claim for punitive damages is one classic instance of the manner in which civil discovery is used to achieve a litigation advantage never contemplated when the methodology was introduced into pretrial procedure. *Causes of action for punitive damages have become very easy to allege.* (See, e.g., *Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980.) Response to discovery seeking financial information places a severe burden on the responder. As a minimum, there is the time and expense necessary to the compilation of a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damages which may never be awarded. In addition, there is usually the potential that untoward disclosure of the information obtained may in some way or other react adversely against the disclosing party for reasons totally unrelated to the lawsuit. The possibilities run all the way from greater exposure to the not so gentle solicitations of some charitable organizations *to the possibility of damage to the discloser in the competitive business arena.*"

See: Note, *Pretrial Discovery of Net Worth in Punitive Damage Cases* (1981) 54 So. Cal. L. Rev. 1141.

If, as the Court of Appeals held in this case, the improper or untimely processing of a claim for benefits could expose a fiduciary of an ERISA plan to personal liability for punitive damages, the denial of such a claim could *a fortiori* expose the fiduciary to such liability. ERISA

requires that the boards of trustees of the Northern California Funds assume responsibility for the granting or denial of claims to benefits from the Funds, and at practically every meeting of the boards of the Pension Funds and the Health and Welfare Funds particularly, the boards must decide appeals from the administrative denial of claims. ERISA also requires that the decisions on these appeals be solely in the interests of the participants and beneficiaries of the plans and in accordance with the documents and instruments governing the plans insofar as the documents and instruments are consistent with ERISA (ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)).

The claims that have been denied have already been carefully screened administratively under these guidelines so that inevitably many of the appeals must be rejected. An individual trustee who has been required to participate in these difficult decisions and who knows that any disappointed claimant may file an action against him personally in a federal district court and by a simple allegation and claim for punitive damages obtain the right to inquire into his personal financial affairs could not be blamed if he resigned from his trusteeship, and a potential trustee could not be blamed for declining to serve under such unrealistic and unjust legal rules.

The interest of the Northern California Funds in the petition for a writ of certiorari in this case is to reverse these unrealistic and unjust legal rules as soon as possible and thereby preserve, for the benefit of the participants and beneficiaries, Funds which have been built up to their present importance over a period of more than 30 years, which

have been well run for all of that period, and which Congress did not intend to cripple or destroy when it enacted ERISA.

SUMMARY OF ARGUMENT

The holding that a plan participant may sue the fiduciary of the plan for punitive damages because of the improper or untimely processing of his benefit claim was based on an uncritical and erroneous reading of the legislative history of ERISA. When that history is correctly read it compels the conclusion that Congress intended to limit the civil enforcement remedies provided by ERISA to the more flexible and less draconic remedies developed by courts of equity.

This conclusion is confirmed by the fact that Congress provided in ERISA for a claims review procedure and made plan fiduciaries primarily responsible for establishing and operating the procedure. Congress must have intended to protect the fiduciaries from harassment or intimidation in connection with the exercise of this responsibility. Further, the procedure was intended to provide an expeditious and relatively inexpensive method of resolving benefit disputes. Both of these objectives would be defeated by the complication, delay, expense, harassment and risk connected with the assertion and litigation of claims for punitive damages.

ARGUMENT

Congress Did Not Intend by the Enactment of ERISA to Subject a Fiduciary of a Covered Employee Benefit Plan to an Action for Punitive Damages by a Plan Participant Who Alleges that the Fiduciary Has Processed His Claim in an

Improper or Untimely Manner or Has Arbitrarily and Capriciously Denied His Claim for Benefits.

The Court of Appeals, in ruling that a plan participant may sue the fiduciary of the plan for punitive damages because of the alleged improper or untimely processing of his claim, relied upon statements in Congressional committee reports that the committees intended to provide both the Secretary of Labor and plan participants and beneficiaries with "the full range of legal and equitable remedies available in both state and federal courts" (722 F.2d 491). The last version of the bill which ultimately became ERISA to contain language supporting these sweeping statements, however, was H.R. 2 as passed by the Senate on March 4, 1974, which provided in Section 693 that "[c]ivil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary . . . may be brought by any participant or beneficiary of any employee benefit plan or fund subject to the Welfare and Pension Plans Disclosure Act in any court of competent jurisdiction, State or Federal, . . . (Legislative History of the Employee Retirement Income Security Act of 1974, Public Law 93-406, prepared by the Sub-Committee on Labor of the Committee on Labor and Public Welfare, United States Senate, April, 1976, Vol. III, pp. 3599, 3816-3817).[2]

The sweeping language of Section 693 was drastically changed in ERISA as finally enacted. The only action that ERISA permits to be brought in a State court is an action by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights

[2]Hereafter referred to as "Legis. Hist."

under the terms of the plan, or to clarify his right to future benefits under the terms of the plan" (Section 502(a)(1)(B)). All other actions must be brought in the federal courts and actions by a participant or beneficiary or the Secretary of Labor to redress violations of the Act are expressly limited to actions to obtain injunctive "or other appropriate *equitable* relief" (Sections 502(a)(3) and (a)(5)).

The provisions of Section 502(a)(3) and (a)(5) make it impossible, we submit, to distill from the provisions of Section 502(a)(2) an intention on the part of Congress to provide to the Secretary and participants and beneficiaries the "full range of legal and equitable remedies available in both state and federal courts" which Section 693 of H.R. 2 would have provided. The only possible conclusion from the terms of the Act as passed is the one drawn by petitioners, namely, that Congress deliberately intended to limit the civil enforcement remedies provided by the Act to the more flexible and less draconic remedies developed by courts of equity (Petition, pages 11-12).

This conclusion is confirmed by the legislative history of ERISA. As noted by petitioners (Petition, p. 16), ERISA § 503, 29 U.S.C. § 1133, and regulations issued pursuant to that Section, require that a plan establish a reasonable claims procedure which provides for a full, fair and prompt review by the plan fiduciary of a decision denying a claim. The genesis of this provision was explained in the Conference Report on H.R. 2, Rep. No. 93-1280, 93d Cong., 2d Sess., at p. 328 (Legis. Hist., p. 4595) as follows:

> "*Benefit Claim Procedure.*—The bill as passed by the House contains no provisions providing for procedures

for resolving disputes between the plan administrator and participants or beneficiaries. Under the bill as passed by the Senate each pension plan is required to establish a procedure for a review of disputes between the plan administrator and participants or beneficiaries and afford an opportunity for arbitration of any dispute. Under the conference agreement every employee benefit plan is required to provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for denial written in a manner calculated to be understood by the participant. In addition, the plan administrator is required to afford a reasonable opportunity to any participant or beneficiary whose claim for benefits has been denied for a full and fair review of this decision by the plan administrator."

The purpose of the provision, and the reason for its final form, were explained by Senator Javits as follows (Legis. Hist., p. 4769):

> "The Senate bill provided that each plan was to incorporate a procedure for arbitration of benefit claim disputes between the plan and participants and beneficiaries. The House bill contained no comparable provision. *House conferees were opposed to the Senate provision on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes, and at their insistence it was dropped in conference.* I regret this decision since I believe the Senate bill would have provided a relatively inexpensive way for the resolution of minor benefit disputes for the many participants and beneficiaries who lack the resources to pursue their claims through the courts. Nevertheless, I am encouraged that the conferees agreed to direct the Joint Pension Task Force to study the feasibility of this approach, and *by the acceptance of provisions*

> *contained in the original Williams-Javits bill that would require a full and fair claims procedure—Section 503—as well as the provisions authorizing the Secretary of Labor to enforce benefits denied in violation of law—Section 502(b).*"

In the light of this legislative history the Courts have construed Section 503 as requiring that a plan participant or beneficiary whose claim to benefits has been denied exhaust the plan's claims review procedure before resorting to the courts (*Amato v. Bernard* (9th C.A. 1980) 618 F.2d 559; *Challenger v. Local Union No. 1 of the International Bridge, Structural and Ornamental Ironworkers* (7th C.A. 1980) 619 F.2d 645; *Taylor v. Bakery & Confectionary Union & Industry International Welfare Fund* (E.D.N.C. 1978) 455 F. Supp. 816, 820).

In *Taylor* the Court said (455 F. Supp. at pp. 819-820):

> "An examination of the underlying ERISA policies, interpreted analogously to the development of federal law under LMRA § 301, leads the court to conclude that Congress intended a claimant to exhaust his interfund remedies before seeking federal court review (with two exceptions noted infra). First, Section 1133 of the Act specifically requires the establishment of claims procedures, and the Secretary of Labor, pursuant to 29 U.S.C. § 1135, has promulgated extensive guidelines to implement these procedures. *Much like the labor grievance system, this claim/appeals mechanism is designed to reduce frivolous claims, promote the consistent treatment of claims, and create a non-adversarial method of claims settlement.* CF. Vaca v. Sipes, 386 U.S. 171, 191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

Tied to these inter-fund claims procedures was Congress' awareness of the potential costs of pension reform, and *it sought to 'strike a balance between providing meaningful reform and keeping costs within reasonable limits.'* [1974] U.S. Code Cong. & Admin. News, pp. 4670, 4682. Congress was particularly concerned with outlining a private insurance system that would operate efficiently, thereby increasing its acceptance and institution among American business. U. S. Code News, supra. If claimants were allowed to litigate the validity of their claims before a final trustee decision was rendered, the costs of dispute settlement would increase markedly for employers. Employees would also suffer financially because, rather than utilize a simple procedure which allows them to deal directly with their employer, they would have to employ an attorney and bear the costs of adversary litigation in the courts.

Finally, the broad managerial discretion granted trustees under the ERISA statutory provisions indicates *a Congressional intent that they be primarily responsible for establishing and operating the claims procedures.* See Hines v. Anchor Motor Freight, Inc. 424 U.S. 554, 562-64, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976) (LMRA § 301, grievance procedure contest)."

Congress, having made plan fiduciaries primarily responsible for establishing and operating the claims procedures, must certainly have intended to protect those fiduciaries from harassment or intimidation in connection with the exercise of that responsibility. This Court has not hesitated to recognize and enforce such protection for decision-

makers in comparable contexts and for comparable reasons (see *Butz v. Economu,* 438 U.S. 478, 511, 93 S.Ct. 2894, 2913 (1978); *Briscoe v. Lahue,* U.S. , 103 S.Ct. 1108, 1120 (1983)). The reasoning of these cases supports the position of petitioners (Petition p. 15) that Congress could not have intended to impose personal liability for punitive damages upon plan fiduciaries for action taken in the operation of the claims procedure, since the threat of such liability disrupts the reasoned decision making which Congress considered essential to ERISA. Protection from the threat of personal liability, and the harassment connected with suits to enforce such liability, promotes the interest of all plan participants and beneficiaries in the uniform and impartial application by plan fiduciaries of the terms of the plan, while the right of an individual participant or beneficiary to sue for enforcement of his rights under the plan (ERISA § 502(a)(1)(B)) and to seek the assistance of the Secretary of Labor in enforcing participation, vesting and funding rights (ERISA § 502(b)), provides ample protection against abuse of the decision-making function in individual cases (*Cf. Nixon v. Fitzgerald,* U.S. , 102 S.Ct. 2690, 2706 (1983)).

Further, the holding that fiduciaries may be held personally liable for punitive damages, even under the limited circumstances the *Russell* Court deemed "appropriate", inevitably complicates the court review of the decisions of plan fiduciaries and increases the time and expense of such review, thereby defeating one of the other important objectives of the claim review procedures. In order to prevail in an action to secure court review of the decision of a plan fiduciary denying a claim to benefits, the plaintiff must

allege and prove that the decision was arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law (*Rehmar v. Smith* (9th CA 1976) 555 F.2d 1362, 1371; *Music v. Western Conference of Teamsters Pension Trust Fund* (9th CA 1983) 712 F.2d 413, 418). By naming the fiduciary as a defendant individually and including in his complaint a prayer for punitive damages and an allegation that the fiduciary also acted "with actual malice or wanton indifference to [his] rights", plaintiff can pursue not only the merits of his claim for benefits but also discovery as to the personal financial resources of the fiduciary and the issue as to whether or not the fiduciary should be punished for having denied his claim. Thus, a process which was intended by Congress to provide an expeditious and relatively inexpensive method of resolving benefit disputes would be converted into costly, drawn-out, highly adversarial litigation which would include issues unrelated to the merits of the plaintiff's claim to plan benefits. We submit that both the terms of ERISA and the legislative history of the Act make clear that Congress did not intend such a result, and that this Court should act promptly to review and reverse the decision of the Court of Appeals.

CONCLUSION

Unless this Court grants certiorari, the holding in *Russell* will become the law governing the administration of ERISA plans within the vast area of the Ninth Circuit. These plans are already beset with major problems—enforcement of withdrawal liability, hospital and medical cost containment, affirmative action, etc.—which require the attention, abilities and judgment of responsible leaders in the respective industries served by the plans. The addition to these problems of the intimidation and harassment inherent in the punitive damage remedy threatens to deprive the plans of the services of the fiduciaries who are best able to resolve the problems, and defeats the objective of ERISA to promote the growth and prosperity of covered plans. This Court should act now to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

San Francisco, California
August 1, 1984

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No. 84-9

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

MASSACHUSETTS MUTUAL
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AND CECELIA STEVENSON,

Petitioner,

vs.

DORIS RUSSELL,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of benefit claims?

PARTIES TO THE PROCEEDING

The parties to this action are Massachusetts Mutual Life Insurance Company, Cecelia Stevenson and Doris Russell. The claims against defendant Cecelia Stevenson are not at issue in this appeal to the Supreme Court.

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Respondent, DORIS RUSSELL, respectfully concurs that a writ of certiorari issue should be granted to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit

entered in this proceeding on December 16, 1983. However, Respondent prays that the Supreme Court affirm the opinion of the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983), and appears in Petitioner's Appendix at 1a to 25a. The order of the United States District Court for the Central District of California granting Petitioner's motion for summary judgment, as well as the findings of fact and conclusions of law issued in connection therewith, are unreported and appear in Petitioner's Appendix at 26a and 32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 16, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on April 6, 1984. Petitioner's Appendix at 34a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves sections 409, 501, and 503 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. Sections 1109, 1131, 1132, and 1133 (1982), and 29 C.F.R. Section 2560.503-1

(1983) promulgated under ERISA section 503. These provisions are reproduced in Respondent's Appendix at 28 through 39.

I

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This action was filed by Respondent DORIS RUSSELL (hereinafter "Russell") to recover damages which resulted from the termination of her employment and her employee benefits by her employer, Massachusetts Mutual Life Insurance Company (hereinafter "Mass Mutual") for a period extending from October 17, 1979, until on or about March 13, 1980. The Salary Continuance Plan and Long Term Disability

plan are company funded employee benefit plans qualified under ERISA.

Russell contends that in terminating her employment and Salary Continuance benefits, Mass Mutual violated its duty to deal in good faith with her. At the time of her termination, Russell was unable to work because of a psychosomatic illness. She contends that in wrongfully terminating her benefits, Mass Mutual acted arbitrarily and capriciously and breached its fiduciary duty towards her, causing her economic damage by forcing a cash-out of her husband's retirement plan and causing further psychological damage to her pre-existing psychiatric condition.

Russell contends that Mass Mutual wrongfully terminated her employment without cause, in violation of the implied

contract of employment established by her long and exemplary service, and that Mass Mutual terminated her solely to avoid having to pay her benefits. Russell contends that Mass Mutual had knowledge that she had no source of income and was suffering from a psychological condition, and that Mass Mutual's actions were intended to inflict emotional distress upon her.

B. STATEMENT OF FACTS

Petitioner's statement of facts is misleading in that it makes no reference to the unusual facts of this case which differentiate it from a simple suit to recover benefits under the plan. The following facts should be considered by the court:

Russell, a 54 year-old woman, was an employee of Mass Mutual for fifteen (15) years as a claims examiner. On May 11, 1979, Russell was incapacitated with intolerable back pains due to stress. She had previously taken leaves of absence for back pain caused by psychiatric and psychosomatic illnesses in 1967 and 1977. Russell provided all documentation required by the Salary Continuance Plan booklet. Russell also went to a psychiatrist to attempt to deal with her psychosomatic back and neck pains and depression.

In late August 1979, Russell's claim for Salary Continuance was brought before Mass Mutual's Disability Committee for review, although the Disability Committee is not authorized to review claims under SCP. The "independent" committee, appointed

by Mass Mutual, which advises the plan administrator, applied the Long Term Disability procedure for reviewing Russell's claim which is significantly stricter than the SCP procedure.

The Disability Committee failed to review any of the past medical records of Russell at any time during their proceedings although Russell requested that they do so on more than one occasion to verify the psychosomatic nature of her illness. On September 18, 1979, the Disability Committee required Russell to submit to an unauthorized "independent" orthopedic examination by Dr. D. Rosco, rather than ask Russell's doctor for additional verification or clarification.

Dr. Rosco's report evaluated Russell from strictly an orthopedic point of view

as requested by Mass Mutual. His report failed to mention that she was seeing a psychiatrist and it mischaracterized her injuries as resulting from a slip and fall accident. Dr. Rosco corrected and clarified his report on or about November 5, 1979, but said letter was never reviewed by the Disability Committee.

On October 12, 1979, the Disability Committee convened and terminated Russell's benefits based upon Dr. Rosco's report. Russell was notified of this action in a letter from Charles Dole. Russell immediately sent a letter on October 22, 1979, to Mr. Dole demanding a review of Mass Mutual's decision, requesting a review of her past medical records, and indicating that her illness was psychosomatic and not orthopedic. She sent a letter on October

23, 1979, to the president of Mass Mutual indicating the same thing. Both letters were forwarded to the plan administrator by October 25, 1979.

Mass Mutual refused to review Russell's past medical records on file and upon receiving Russell's packet, including a psychiatrist report on or about November 23, 1979, from Dr. Ziferstein, requested another unauthorized independent psychiatric examination rather than ask for clarification from Dr. Ziferstein or Russell. This evaluation by Dr. Saul Faerstein confirmed Russell's position that she in fact suffered from psychosomatic neck and back pains and depression.

Russell had been perturbed but confident that the oversight which terminated her SCP benefits would be reinstated as

soon as Mass Mutual reviewed Dr. Ziferstein's report in late November. When, on or about December 15, 1979, Russell received notification that she was being sent to an "independent" psychiatrist and that Mass Mutual was not going to reinstate her benefits in the near future, she suffered extreme emotional trauma and a feeling of betrayal by Mass Mutual.

Russell's husband, Ronald Russell was also disabled at this time and was receiving no income. Russell and her husband came to the conclusion that there was no other alternative than to cash out his retirement plan with Los Angeles County for approximately $12,000. In doing so, Russell's husband was giving up approximately $450.00 a month for the rest of his life, commencing sometime in 1980 along with

all fringe benefits including low rates for medical, dental, and optical insurance for both of them.

Russell was reinstated to the SCP and to her employment on or about March 13, 1980, one hundred and thirty-nine (139) days after the plan administrator received Russell's request for review on October 25, 1979.

II

SUMMARY OF ARGUMENT

There are two issues presented to the Supreme Court for its review, 1) whether an ERISA fiduciary may be held liable for extra-contractual damages for a breach of fiduciary duty and, 2) whether an ERISA fiduciary may be held liable for punitive

damages for malicious, wanton, or bad faith misconduct. There is a conflict between the circuits and among the district courts on these issues. Therefore, Respondent agrees that it would be proper for the Supreme Court to review the opinion of the Ninth Circuit in order to resolve the conflict. However, Respondent contends that the decision of the Ninth Circuit is correct and should be affirmed.

ERISA provides broad legal and equitable remedies against fiduciaries who breach their duties. ERISA is remedial legislation which should be construed liberally in favor of those persons it was meant to protect, namely, participants and beneficiaries under covered pension and welfare plans. Congress intended that a body of Federal substantive law be developed

by the courts to fill in the gaps left by ERISA's provisions and to fulfill its purpose of redressing and preventing violations of the Act. Extra-contractual damages should be allowed under ERISA to remedy the wrong, make the aggrieved individual whole and compensate for mental and emotional distress. Punitive damages should be allowed in limited circumstances where the fiduciary acts with actual malice, bad faith, or wanton indifference to the rights of a participant or beneficiary.

To hold that a plan participant or beneficiary can never recover punitive or compensatory damages would immunize plan fiduciaries from liability for their intentional breaches of duty that injure plan participants and beneficiaries. Such a result is inconsistent with the express

policy of ERISA to protect the interests of participants and to provide broad legal and equitable remedies.

III

REASONS FOR GRANTING THE WRIT

The question presented for review by Petitioners is as follows:

> Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper

or untimely processing of
benefit claims.

Petitioners contend that a review of the ruling of the Ninth Circuit with regards to punitive damages and extra-contractual or compensatory damages is essential to resolve a conflict between the Ninth and Eight Circuits and among the district courts. Respondent agrees that a conflict exists among the courts and that it would be appropriate for the Supreme Court to review the decision of the Ninth Circuit and resolve the conflict. Respondent contends, however, that the decision of the Ninth Circuit is correct and should be affirmed, and that conflicting cases should be disapproved or overruled.

IV

REASONS WHY THE OPINION OF THE NINTH CIRCUIT SHOULD BE AFFIRMED

A. INTRODUCTION

The question presented for review to the Supreme Court by Mass Mutual is misleading in that it appears to be equating mere improper handling or untimely processing of benefit claims with an award of punitive damages. The question before the court is actually a two-part question. One question is whether an ERISA fiduciary may be held personally liable to a plan participant or beneficiary for punitive damages for wanton, arbitrary, malicious, or bad faith misconduct of the fiduciary when processing benefit claims; and the other question is whether a fiduciary may

be held personally liable for extra-contractual damages for breach of fiduciary duty which may include improper or untimely processing of benefit claims. It is misleading to combine the two issues because the standards for granting punitive damages are much stricter than those for compensatory damages. Mass Mutual suggests that either a beneficiary would be entitled to both punitive and compensatory damages against a fiduciary or to neither. Russell submits that the court should review these two questions separately.

Further, Russell submits that Mass Mutual has chosen the phrase "improperly or untimely processing of benefit claims", rather than such language as "misconduct", "bad faith", "arbitrary conduct", "wanton indifference", or "malicious conduct" used

by the Ninth Circuit herin, to suggest that the Ninth Circuit found punitive and compensatory damages available in trivial and routine cases, such as where a fiduciary is a few days late in paying a claim. The Ninth Circuit clearly stated that these damages would only be available in limited circumstances for a substantial breach of fiduciary duty, and not as a matter of course.

Petitioner, Mass Mutual, leads the court to believe that the action herein is a simple and routine dispute involving employee benefits governed by ERISA. Mass Mutual contends because Russell availed herself of the ERISA appeal procedures, recovered her back benefits and was reinstated to employment, she could not be able to recover any damages for the bad faith

actions of the fiduciaries in terminating her benefits and her employment.

Russell does not dispute the fact that she was ultimately paid the salary continuance benefits to which she was entitled. The question before the Court is not whether more benefits are due under the plan, but whether the fiduciaries are responsible for any damages Russell incurred as a result of their bad faith actions towards her. In particular, the issue is whether plan fiduciaries can wrongfully deprive participants of benefits for extended periods of time and subsequently pay the participant merely the accrued plan benefits with no recourse to the participant for extra-contractual damages incurred as a direct and proximate result of the wrongful acts of the fiduciaries.

The primary purpose of ERISA was to provide plan participants and beneficiaries with greater security and more protection. It would defeat this purpose if Mass Mutual were allowed to use ERISA to shield them from all liability to Russell for their bad faith actions.

B. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT ERISA ALLOWS CLAIMS FOR COMPENSATORY AND PUNITIVE DAMAGES AGAINST FIDUCIARIES

1. BENEFICIARIES ARE ENTITLED TO BROAD, EQUITABLE, AND LEGAL REMEDIES UNDER ERISA

Under 29 U.S.C. Section 1132, participants are provided broad remedies against fiduciaries who breach their duties. 29 U.S.C. Section 1109 states that any person who breaches a fiduciary duty shall be

subject to such equitable and remedial relief as the court deems proper.

The congressional intent was as follows:

> "The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcements of fiduciary responsibilities under state law or recovery of benefits due to participants."
>
> (Legislative History of Employee Retirement Act of 1974 Vol. III, p. 4871).

Similarly, the court stated in <u>Bittner v. Sadoff and Rudoy Industries</u>, 490 F.Supp. 534, 536 (E.D. Wis. 1980):

> "Congress intended to provide the full range of legal and equitable remedies available in both state and federal courts to those persons who

have been injured by those practices made unlawful by ERISA."

Mass Mutual claims that Russell is not entitled to any damages because she has received all the benefits due to her under the plan. However, it is not a prerequisite to request benefits under the plan in order to recover damages or seek other equitable remedies. Lieske v. Morlock, 570 F.Supp. 1426, 1430 (N.D. Ill. 1983), Lechner v. National Benefit Fund for Hospital and Care Employees, 512 F.Supp. 1220, 1223 (1981). At the very least, she is entitled to be compensated for the loss of her husband's community retirement plan and its benefits, and back interest on the monies withheld. It was clearly not the intent of Congress to allow a "fiduciary" to totally refuse to look at medical evidence that was

requested to be reviewed, apply the wrong standards for reviewing a claim, fail to make a timely decision within the 60-day, or with good cause, 120-day period, and then escape all liability as a matter of law by later paying merely the back benefits.

Mass Mutual does not actually contend that the conduct of the fiduciaries was not arbitrary, or that it did not evidence bad faith, wanton indifference, or malice. Mass Mutual simply states that participants are not entitled to compensatory or punitive damages as a matter of law.

Mass Mutual contends that compensatory and punitive damages are not available under the equitable and remedial relief provisions of ERISA. Mass Mutual analogizes ERISA to the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. Section

185[a]) Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et.seq.), and the Age Discrimination in Employment Act (ADEA), (29 U.S.C. Section 621 et.seq.) claiming that compensatory and punitive damages are not available under the LMRA, Title VII, or the ADEA.

The House Conference Report on ERISA stated that ERISA actions are to be regarded as arising under the laws of the United States in a similar fashion to those brought under the LMRA. 3 U.S. Code Cong. Ad. News 5106 (1947). Like ERISA the LMRA addresses itself primarily to disclosure and reporting requirements rather than to the rights and remedies of beneficiaries for wrongful denial of benefits. Significantly, the provisions of the LMRA do not exempt or relieve any

person from any liability, duty or penalty provided by any state law. (Section 309). If ERISA was patterned by Congress after the LMRA, the intent must have been to provide participants and beneficiaries with greater protection and additional remedies not heretofore available and not to deprive participants and beneficiaries of remedies which would have been available if ERISA had not been enacted.

Mass Mutual also contends that general and punitive damages are barred by Title VII. The courts have disagreed as to whether general and punitive damages are barred under Title VII. In Jones v. Trailways Corp, 477 F.Supp. 642, 648 (D.C. 1979), the court awarded general damages under Title VII for physical pain and emotional distress. Compensatory damages were also

allowed in Tidwell v. American Oil Co., 332 F.Supp. 424 (Utah 1971), Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3rd Cir. 1973). The court ruled in Scott v. Bradley, 455 F.Supp. 672, 673 (E.D. Vir. 1978) and Spence v. Staras, 507 F.2d 554, 558 (7th Cir. 1974) that punitive damages may be awarded under the Civil Rights statutes under certain aggravating circumstances. In Kyriazi v. Western Electric Co., 476 F.Supp. 335, 340 (D.N.J. 1979), the court awarded punitive damages against the individual defendants to punish them and to deter future wrongdoing. See also Claiborne v. Illinois Central Railroad, 401 F.Supp. 1022 (E.D. La. 1974), Tooles v. Kellogg Co., 336 F.Supp. 14 (D. Neb. 1972), Developments in the Law - Title VII, 84 Harv. L. Rev. 1109, 1262 (1971).

Furthermore, like the LMRA, Title VII does not bar state remedies. 42 U.S.C. Section 2000e (7). The court stated in Spence v. Staras, supra, 558, that in civil rights actions, both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statues. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-9 (1974), the Supreme Court stated:

> Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination [emphasis added]."

See also Johnson v. Railway Express Agency, 421 U.S. 454, 459, 44 L.Ed 2d, 95 S.Ct. 1716 (1975).

Thus if ERISA was patterned after Title VII and the LMRA, it would appear that ERISA was designed to supplement existing state and common law remedies rather than to bar them. Further, by analogy to Title VII and the LMRA, compensatory and punitive damages could be available under ERISA in appropriate circumstances.

Mass Mutual also argues that punitive and compensatory damages should not be available under ERISA by analogy to the ADEA. Some courts have held that punitive damages and damages for pain and suffering are not allowed under the ADEA, but the ADEA provides liquidated damages in twice

the amount of unpaid wages. These liquidated damages are available to provide full compensatory relief and to deter willful violations. Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977), Pfiefer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982).

Further, many courts have held that both compensatory and punitive damages are available under the ADEA in certain circumstances to realize the purpose of the act. Vasquez v. Eastern Airlines, Inc., 579 F.2d 107 (1st Cir. 1978), Combes v. Griffin Television, Inc., 421 F.Supp. 841 (N.D. Okl. 1976), Bertrand v. Orkin Exterminating Company, 432 F.Supp. 952 (N.D. Ill. 1977), Coates v. National Cash Register Co., 433 F.Supp. 655 (W.D. Vir. 1977).

Unlike the LMRA and Title VII, ERISA preempts state and common law remedies under which punitive and compensatory damages could be available. Unlike the ADEA, ERISA does not provide for liquidated damages. As the Ninth Circuit correctly stated in its opinion herein, it would be anomalous for Congress to "occupy the field" with respect to the interest of participants and beneficiaries under pension and benefit plans without providing federal protections and remedies to replace those barred. Congress intended that a body of Federal substantive law be developed by the courts to fill in the gaps left by ERISA's express provisions. Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1351, 1356 (8th Cir. 1980).

ERISA preempts the California state causes of action that a claimant in Russell's position would have for breach of fiduciary duty, breach of covenant of good faith and fair dealing, breach of the California Insurance Code Section 790.03, and intentional infliction of emotional distress, under which she would be entitled to compensatory damages, damages for emotional distress, and punitive damages. Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 157 Cal.Rptr. 482 (1979), Delos v. Farmers Insurance Group, 93 Cal.App. 3d 642, 650, 155 Cal.Rptr. 843 (1979), Fletcher v. Western National Life Insurance Co., 10 Cal.App. 3d 658, 89 Cal.Rptr. 843 (1979), Little v. Stuyvesant Life Insurance Co., 67 Cal.App. 3d 451, 463 (1977). It would be inequitable for ERISA to preempt

all of these remedies without providing federal remedies to replace them.

ERISA is similar to the Landrum-Griffin Act, 29 U.S.C. Section 411 (1976), in that its principle objective is to safeguard the rights of workers against the abuses or excesses of the institutions that exist to serve them. The right to recover punitive and compensatory damages has been consistently upheld in cases under the Landrum-Griffin Act. International B'd of Boilermakers v. Braswell, 388 F.2d 193, 199-201 (5th Cir.) cert den 391 U.S. 935, 88 S.Ct. 1848, 20 L.Ed. 2d 854 (1968). For example, in Cooke v. Orange Belt Dist. Council of Painters, 529 F.2d 815, 820 (9th Cir. 1976), the Ninth Circuit held that punitive damages might be awarded under appropriate circumstances to serve

as a deterrent to those abuses which Congress sought to prevent. In Bise v. International Bro. of Electrical Wrkrs., 618 F.2d 1299 (9th Cir. 1979), the court allowed compensatory damages for emotional distress as well as punitive damages. By analogy to the Landrum-Griffen Act, compensatory and punitive damages should be allowed in ERISA cases.

The court stated in Landro v. Glendenning Motorways, Inc., supra, that ERISA is remedial legislation which should be construed liberally in favor of those persons it was meant to benefit and protect, namely participants in and beneficiaries under covered pension and welfare plans. In light of the legislative policy behind ERISA, the opinion of the Ninth Circuit with regard to punitive and extra-

contractual damages should be affirmed.

2. THE AVAILABILITY OF PUNITIVE DAMAGES IS IN ACCORD WITH THE POLICY OF ERISA AND WILL NOT HAVE DELETERIOUS CONSEQUENCES

The opinion of the Ninth Circuit that punitive damages are available under ERISA is based upon the legislative history, the policy of ERISA, and numerous case authorities. Congress intended to provide broad remedies for redressing or preventing violations of the Act and to provide the full range of legal and equitable remedies available in both state and federal courts. 1974 U.S. Code Cong. and Ad News, 4639, 4655, 4838, 3871. The availability of punitive damages serves a deterrent purpose.

In Eaton v. D'Amato, 581 F.Supp. 743 (D.C. 1980), the court held that punitive damages are available under Section 1109 where there has been a willful, malicious or outrageous breach of fiduciary duty. Other cases allowing punitive damages include Winterrowd v. David Freedman and Co., Inc., 724 F.2d 823 (4th Cir. 1984), Jiminez v. Pioneer Diecasters, 549 F.Supp. 677 (C.D. Cal. 1982), Kann v. Keystone Resources, Inc., 575 F.Supp. 1084 (W.D. Pa. 1983).

Mass Mutual contends (at page 5) that the availability of punitive damages against fiduciaries will have a widespread deleterious impact on the conduct of fiduciaries. Mass Mutual contends that fiduciaries may feel compelled to process or settle unjustified claims out of fear

punitive awards against them, thus transgressing the principles of prudence and reasonableness to the financial detriment of the plan. Mass Mutual also contends that qualified individuals will be deterred from serving as fiduciaries because of the possibility of personal liability.

The opinion of the Ninth Circuit herein held that punitive damages may be available only in very limited circumstances where the fiduciary acts with actual malice or wanton indifference to the rights of a participant or beneficiary. The Ninth Circuit stressed this limitation again in Winterrowd v. Freedman Co., 724 F.2d 823 (9th Cir. 1984). An ERISA fiduciary acting prudently and in good faith would have no need to worry about personal liability for punitive damages. Like any

other fiduciary, an ERISA fiduciary would only be liable for willful, malicious, outrageous, or wanton conduct.

Mass Mutual cites no authority to the effect that ERISA fiduciaries should have an immunity not accorded to fiduciaries in other capacities. In fact, ERISA fiduciaries may be held to a higher standard of conduct than required under traditional trust law. In Eaton v. D'Amato, 581 F.Supp. 743 (D.C. 1980), the court noted that it was the intent of Congress to expand the scope of fiduciary standards of conduct to assure adequate protection for the interests of plan participants and beneficiaries. See also Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978).

Mass Mutual also contends (at pages 16-17) that the availability of punitive

damages will result in a proliferation of litigation in the federal court and a diminishment in the internal resolution of disputes. Considering the limited circumstances under which punitive damages would be available, it is very unlikely that a flood of unnecessary litigation would occur. In the case of frivolous claims, ERISA provides for attorneys fees to compensate for the costs of defending the plan.

With regards to Mass Mutual's contention that the availability of punitive damages will discourage settlement on the part of claimants, it is as likely that the fiduciaries of a plan will be less inclined to compromise claims short of a lawsuit where they realize that the most the plan stands to lose in a lawsuit is the amount of the benefits denied. <u>Vasquez v. Eastern</u>

Airlines, Inc, 579 F.2d 107 (1st Cir. 1978) (ADEA).

All of these arguments advanced by Mass Mutual are mere speculation. They attempt to alarm the court with emotional predictions of the allegedly deleterious consequences of allowing punitive damages. These arguments have very little basis on sound legal reasoning, legislative analysis, or case authority.

Mass Mutual argues that exposure of benefit plans to compensatory and punitive damages would endanger the financial soundness of benefit plans. Similar arguments were rejected by the court in Wadsworth v. Whaland, 562 F.2d 70, 78 (1st Cir. 1977) and Eaton v. D'Amato, supra. While protection of the financial soundness of plans is one of the aims of ERISA, the primary

aim of ERISA is to protect the rights of beneficiaries. If one were to follow Mass Mutual's argument to its logical extension, one could argue that it would be in the best financial interests of the plan to never pay any benefits at all until sued. The intent of ERISA is to protect the financial soundness of plans for the sake of beneficiaries, not at the expense of beneficiaries.

Furthermore, the issue to be reviewed herein is not whether punitive damages should be available against the plan itself, but against the fiduciaries personally. Fiduciaries should not be able to use ERISA as a shield to protect them from liability for their wrongful acts towards participants.

3. THERE IS EXTENSIVE SUPPORT IN THE LEGISLATIVE HISTORY AND LANGUAGE OF ERISA FOR THE AVAILABILITY OF EXTRA-CONTRACTUAL DAMAGES

Mass Mutual contends that its arguments with regard to punitive damages should also be applied to the issue of extra-contractual damages. However, Mass Mutual cites very little authority for the unavailability of these damages. In actuality, the cases are almost unanimous in allowing compensatory damages under ERISA.

The congressional intent was to provide for the full range of legal and equitable remedies available in both state and federal courts. Legislative History of Employee Retirement Act of 1974, Vol III, at 4838 and 4871. 29 U.S.C. Section 1109 provides for equitable and remedial relief for a

breach of fiduciary duty.

One of the equitable remedies clearly available under ERISA is restitution to make the claimant whole and to restore the status quo. Rogers v. Loether, 467 F.2d 110 (7th Cir. 1972). In a discussion of the "make whole" provisions of Title VII, the Supreme Court stated as follows in Albemarle Paper Co. v. Moody, 422 U.S. 405, 45 L.Ed. 2nd 280, 95 S.Ct. 2362 (1975):

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief...And where a legal injury of an economic character, the general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the enjury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may

> be, in the situation he would have occupied if the wrong had not been committed."

Numerous cases have held that compensatory damages are available under ERISA to remedy the wrong, make the aggrieved individual whole or compensate him for mental or emotional distress. Free v. Gilbert Hodgman, Inc., 3 Empl. Ben Case (BNA) 1010, 1012 (N.D. Ill. 1982), Bobo v. 1950 Pension Plan, 548 F.Supp. 623, 626 (W.D. N.Y. 1982), Eaton v. D'Amato, 581 F.Supp. 734 (D.C. 1980), Bittner v. Sadoff and Rudoy Industries, 490 F.Supp. 534, 536 (E.D. Wis. 1980).

Mass Mutual cites the case of Bittner v. Sadoff Rudoy Industries, 728 F.2d 820, 825 (7th Cir. 1984), where the court held that ERISA conferred, under Section 1132, no right to sue in state court for mental

suffering caused by a violation of the terms of the plan. Mass Mutual also relies on the case Hurn v. Retirement Fund Trust, 424 F.Supp. 80 (C.D. Cal. 1976), where the court also found in a conclusion of law that no damages for emotional distress are available under 1132. The Ninth Circuit in its opinion herein found that compensatory damages are available under Section 1109 and therefore does not conflict with the cases cited by Mass Mutual.

The court held that compensatory damages are recoverable under ERISA in Jiminez v. Pioneer Diecasters, 549 F.Sup. 577 (C.D. Cal. 1982). The court stated as follows (at 681):

> "To hold that a plan participant or beneficiary can never recover punitive or compensatory damages would immunize plan fiduciaries from

> liability for their intentional breaches of duty that injury plan participicipants and beneficiaries. Such a result is inconsistent with the express policy of ERISA."

C. CONCLUSION

The opinion of the Ninth Circuit herein held that extra-contractual damages are available against a fiduciary under ERISA to remedy the wrong and make an agrieved claimant whole where there has been a breach of fiduciary duty and that punitive damages are also available in very limited circumstances where there is evidence of malice, wanton indifference or other outrageous conduct on the part of the fiduciary. This is a well-reasoned opinion based upon a careful and detailed analysis of the stated policy of ERISA, the

legislative history and the decisions of various circuits.

Petitioner Mass Mutual attempts to make the decision look reckless, poorly reasoned, and in conflict with the policy of ERISA and the majority of the case authority. Through its phrasing of the question presented for review and the misleading statement of facts, Mass Mutual attempts to convince the Supreme Court that the Ninth Circuit has opened the door to a flood of trivial and frivolous litigation which will endanger the stability of ERISA plans and overburden the courts. Russell has shown that this characterization of the decision of the Ninth Circuit is misleading and incorrect.

The decision of the Ninth Circuit is in harmony with the primary purpose of ERISA

to protect the interests of participants and to provide broad remedies for redressing or preventing violations of the act. Respondent Russell respectfully prays that the opinion of the Ninth Circuit be affirmed.

Respectfully submitted,

BRAD N. BAKER
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Attorneys for Respondent

July 23, 1984

APPENDIX

29 U.S.C. 1001

(a) The Congress finds that the growth in size, scope and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope, and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants and the employers, employee organizations,

and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are

losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desireable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards to be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness

of such plans by requiring them to vest the accured benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. Section 1104

(a) (1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) For the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill,

prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3), the diversification requirement

of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(1) such participant or beneficary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's excercise of control.

29 U.S.C. Section 1109

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the

play by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. Section 1132

(a) A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section or

(B) to recover benefits due to him under the terms of his plan, to enforce

his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * *

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the

administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such relief as it deems proper

* * *

(e) (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United

States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary,

the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. Section 1144

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment

companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof,

or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

2a C.F.R. Section 2560.503

(g) (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary,

and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(i) Request a review upon written application to the plan;

(ii) Review pertinent documents; and

(iii) Submit issues and comments in writing.

* * *

(h)(1)(i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing)

require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but no later than 120 days after receipt of a request for review.

(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary, which holds regularly scheduled meetings at least quarterly, a decision on review shall be made by no later than the date of the meeting of the committee or board which immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a decision may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such

as the need to hold a hearing, if the claim procedure provides for a hearing) require a further extension of time for processing, a decision shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review.

(2) If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the claimant prior to the commencement of the extension.

(3) The decision on review shall be in writing and shall include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h)(1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

(6)

No. 84-9

In The Supreme Court
OF THE
United States

October Term, 1983

Massachusetts Mutual Life Insurance Company,
and Cecilia Stevenson,
Petitioners,
v.
Doris Russell,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE PIPE TRUST, IBEW-NECA TRUST, AIRCONDITIONING TRUST AND FLOOR COVERING TRUST IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 84-9

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1983

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

COMES NOW The Southern California Pipe Trades Trust Funds ("Pipe Trust"), the Southern California IBEW-NECA Trust Funds ("IBEW-NECA Trust"), the Airconditioning and Refrigeration Industry Trust Funds ("Airconditioning Trust"), and the Southern California Floor Covering Trust Funds ("Floor Covering Trust"), hereinafter sometimes referred to collectively as the "Trust Funds" and, pursuant to Rule 36.1 of the Rules of this Court, hereby respectfully request that this Court grant leave to file the accompanying Brief of Amici Curiae Pipe Trust, IBEW-NECA Trust, Airconditioning Trust and Floor Covering Trust in support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The Petitioners, Massachusetts Mutual Life Insurance Company and Cecilia Stevenson, have consented to the filing of this Brief, whereas Respondent Doris Russell

has declined to grant permission. The basis for this Motion is as follows:

1. Amici Curiae Trust Funds are so-called "Taft Hartley" Trust Funds, meaning they were created pursuant to collective bargaining between management and labor, and operate under Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5). In addition, The Amici Curiae Trust Funds are multiemployer trust funds with numerous employer contributors and covering a broad geographical area. As more fully described in the accompanying Brief, the individual Trustees of these Trust Funds are representatives of either labor or management, as required by Section 302(c)(5). *NLRB vs. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

2. In addition to being regulated by Section 302(c)(5), each of the Trust Funds is also an "employee benefit plan" within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(3), and is, therefore, regulated by ERISA. Each Trustee of the Amici Curiae Trust Funds, and there are presently 40 such trustees, is a fiduciary within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

3. As more fully described in the Petition for Writ of Certiorari, the Court of Appeals held that, under ERISA, a fiduciary is personally liable for punitive damages and extra-contractual compensatory relief in actions brought by plan participants arising out of claims for benefits. These Amici Curiae are vitally interested in the outcome of this matter, since their respective trustees are ultimately responsible for the processing of hundred of thousands of claims for benefits annually. As fiduciaries, these trustees are therefore exposed to a multitude of situations giving rise to personal liability in the event of error. This repeated exposure exists under the ruling of the Court of Appeals,

notwithstanding the fact that these trustees serve without compensation and on a volunteer basis.

4. The plan of benefits involved in the instant case is *not* a multiemployer plan regulated by Section 302(c)(5). Even though the decision of the Court of Appeals applies with equal force to individual fiduciaries serving as trustees on a multiemployer Section 302(c)(5) Trust Fund, there is no mention of Section 302(c)(5) in the decision and no indication that the Court of Appeals took into account the unique posture of a Section 302(c)(5) Trust Fund. Unless these Amici Curiae are permitted to be heard, there is a serious prospect that insufficient account will be taken of the unique circumstances of a multiemployer Section 302(c)(5) Trust Fund, and that inadequate consideration will be given to the interplay between Section 302(c)(5) and ERISA.

5. This Court has recently made note of the "express congressional policy favoring multiemployer trusts" and chastised a Court of Appeals for failing to take into account that Congressional policy. *Id.* at 338, n. 22. As argued more fully in the annexed Brief of Amici Curiae, there is a substantial chance that the Court of Appeals' decision will radically alter the character of such trusts, if not eliminate them altogether. There are 1,924 multiemployer trusts with 100 or more participants nationwide, which cover 8,337,000 participants. Comptroller General of the United States, Report to the Congress, GAO/HRD-84-1, at 8 (1984). The Amici Curiae Trust Funds submit that no decision impacting on such a broad class should be rendered without the opportunity for an appropriate representative of that class to be heard.

Accordingly, these Amici Curiae Trust Funds respectfully request that leave be granted as requested and the accompanying Brief of Amici Curiae filed and considered by the Court.

Respectfully submitted,

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No. 84-9

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1983

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

BRIEF OF AMICI CURIAE PIPE TRUST, IBEW-NECA TRUST, AIRCONDITIONING TRUST AND FLOOR COVERING TRUST IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICI CURIAE

It is, undoubtedly, common practice for litigants to sound alarums before this Court in hope of persuading the Court that their cause, among all other causes, is worthy of the Court's attention. We refuse to dissemble this Court by urging that lives may hang in the balance upon the instant cause, or that it rises to the level of eliciting some grave constitutional pronouncement. At the same time, and at the risk of being classed with those who would cry wolf, this Court should not remain unsuspecting about the grave consequences which will surely attend the ruling of the Court of Appeals: An enterprise carefully nurtured since

its infancy with Congressional succor, and just now achieving its maturity, will cease to be in any form remotely approaching its historical persona. The Amici Curiae have been and hope to remain a part of that enterprise.

This Brief is being filed jointly on behalf of four Trust Funds: The Southern California Pipe Trades Trust Funds ("Pipe Trust"), The Southern California IBEW-NECA Trust Funds ("IBEW-NECA Trust"), The Airconditioning and Refrigeration Industry Trust Funds ("Airconditioning Trust"), and The Southern California Floor Covering Trust Funds ("Floor Covering Trust"). Each of these Trust Funds is situated in California and was created as a result of collective bargaining on a multiemployer basis between labor and management. Thus, for example, the Pipe Trust was created in about 1957 as a result of collective bargaining between the Southern California Pipe Trades District Council No. 16 of the United Association for and on behalf of its affiliated local unions and the precessor multiemployer association to the Plumbing & Piping Industry Council. The IBEW-NECA Trust, as another example, was created in about 1964 as a result of collective bargaining between Local Union No. 11 International Brotherhood of Electrical Workers, AFL-CIO, and the Los Angeles County Chapter of National Electrical Contractors Association. Each of these Trust Funds, under separate trust indentures, provides both health and welfare benefits and pension benefits to tens of thousands of eligible participants. Each of these Trust Funds is a so-called "Taft-Hartley" trust fund, meaning that each was created under the aegis of Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. Section 186(c)(5). Section 302(c)(5), among other things, requires, and has always required, that "employees and employers [be] equally represented in the administration" of Taft-Hartley pension and health and welfare funds. *NLRB v. Amax Coal Co.*, 453

U.S. 322, 329 (1981). Pursuant to this statutory mandate, the labor organizations and employers who created the instant Trusts have historically appointed their respective representatives to serve as trustees on these Trusts.

There are, and have been, 14 such Trustee representatives on the Pipe Trust, 14 on the IBEW-NECA Trust (pension), 6 on the Airconditioning Trust, and 6 on the Floor Covering Trust. These Trustee representatives are not professionals, in the sense of receiving compensation for serving in the capacity of Trustee or even in the sense of devoting a full-time effort to the position of Trustee. On the contrary, almost all Trustees are employed full-time elsewhere, either by a participating labor organization or by a contributing employer. Accordingly, their service to the respective Trust Funds as Trustee is on a volunteer basis and arises out of their personal commitment to better the industry. The position of Trustee, is, by its nature, a part-time position, carried out in addition to duties and responsibilities elsewhere. While the position is part-time, the Trustees nonetheless carve out of their working life an enormous amount of time and energy to devote to this volunteer effort. Thus, each Trustee devotes in excess of 40 hours per month to the affairs of the Trust Funds, preparing for and attending meetings of the Trustees as a whole, as well as various committee meetings such as administrative, delinquency, appeals, investment (or finance), and building committees.

Under the direction of the Trustees, the Trust Funds annually handle hundreds of thousands of claims for benefits by participants and their dependents. During the 1983 calendar year, the Pipe Trust received *259,328* health and welfare claims and *339* pension applications; the Airconditioning Trust received *45,844* health and welfare claims and *35* pension applications; and the Floor Covering Trust received *8,751* health and welfare claims and *45* pension appli-

cations. During the 1983-4 fiscal year, the IBEW-NECA Trust received *141,909* health and welfare claims and *304* pension applications. Therefore, during a 12-month period, these four Trust Funds alone processed a total of 455,832 health and welfare claims and received 723 pension applications. Not all of these applicants and claimants, of course, are happy with the manner in which their claim or application is processed. There can be no doubt that the promise of punitive damages and extra-contractual compensatory relief held out by the Court below will inspire or induce a greater proportion of these unhappy claimants to seek judicial relief, most likely in federal court. If only one-tenth of one percent of these claims give rise to litigation, the courts will be flooded with over 450 suits per year with respect to these four Trust Funds alone. Moreover, the personal assets of volunteer trustees will be exposed many times over. This is not by any means an idle fear: Following on the heels of the publication of the Court of Appeals opinion, the Pipe Trust was served with a summons and complaint in a case encaptioned *Louis Moot v. Retirement Fund Trust, etc., et al.*, CIV No. 84 3411 HLH (C.D. Cal.) in which 13 of the Pipe Trust's Trustees are named as individual defendants. The plaintiff, who alleges that he was improperly denied certain benefits, seeks damages for "physical and mental pain and suffering" in the sum of $125,000 and punitive damages "in a sum equal to 25% of the net worth of each defendant." The Amici Curiae, therefore, have a plain and immediate interest in the outcome of the instant Petition.

SUMMARY OF ARGUMENT

The Court of Appeals, in *Russell v. Massachusetts Mutual Life Insurance Company,* 722 F.2d 482 (9th Cir. 1983), held that individual fiduciaries are personally liable to plan participants for punitive and extra-contractual compensatory damages under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et

seq., in cases arising out of the untimely handling of benefit claims. The Court of Appeals found the timeliness requirement in the provisions of Section 503 of ERISA, 29 U.S.C. Section 1133, and, in particular, in the regulation promulgated by the Secretary of Labor at 29 CFR Section 2560.503-1(h). This regulation, as the Court of Appeals notes, requires that benefit decisions be made "promptly," but in any event no later than 120 days from the "receipt of a request for review." *Id.* at 489. Failure to meet this time deadline, so the Court held, is a breach of fiduciary duty and exposes individual fiduciaries to the spectre of potentially enormous personal liability. The Court reached this conclusion notwithstanding the fact that the very same regulations issued by the Secretary of Labor provide that if a benefit decision is not rendered within the time required, "the claim shall be deemed denied." 29 CFR § 2560.503-1 (h)(4). This is the only remedy the Secretary of Labor contemplated for untimely action upon a benefit claim, and was undoubtedly drafted so as to permit participants to avoid a contention that they failed to exhaust their administrative remedies in the event they bring suit after the passage of 120 days. *Amato v. Bernard,* 618 F.2d 559 (9th Cir. 1980); *Scheider v. United States Steel Corp.,* 486 F.Supp. 211 (W.D. Pa 1980).

Amici Curiae contend that in reaching its decision, the Court of Appeals failed to take into account the requirements of Section 302(c)(5) of the Labor-Management Relations Act and the expressed Congressional policy favoring multiemployers trusts. Moreover, by implying new remedies into a comprehensive statutory scheme, the Court of Appeals ignored the disparate impact its ruling would have among the several states, despite the clear Congressional purpose of achieving uniformity in the regulation of Taft-Hartley Trust Funds and contrary to prior rulings of this Court in analogous circumstances.

ARGUMENT

I

THE COURT OF APPEALS' HOLDING IS INCONSISTENT WITH THE FEDERAL REGULATORY SCHEME GOVERNING MULTIEMPLOYER, TAFT-HARTLEY TRUST FUNDS.

As stated in the accompanying Motion, there is no mention of Section 302(c)(5) of the Labor-Management Relations Act in the opinion of the Court of Appeals. Similarly, there is no mention of multiemployer trust funds. Yet, it is clear that the ruling of the Court of Appeals applies to fiduciary — trustees of multiemployer Taft Hartley funds, such as these Amici Curiae.

The failure to consider the relationship of Section 302(c)(5) to ERISA leads to some anomalous results: For example, the Court of Appeals noted that "ERISA was intended to serve as a substitute for various existing state protective laws and regulations . . . It would be anomalous if Congress eliminated the protections offered by state law without providing comparable federal protections." *Russell v. Massachusetts Mutual*, 722 F.2d at 488.

However, it is clear that multiemployer Taft-Hartley trust funds were regulated by federal law, to the exclusion of state law, long prior to the passage of ERISA. Moreover, this regulation by federal laws other than ERISA has not been supplanted by ERISA. On the contrary, it continues to date and must, therefore, must be reconciled with ERISA.

Some thirteen years ago, this Court observed that under Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185, retirees have a cause of action in the context of a Taft-Hartley Trust Fund for breach of the obligation to pay pension benefits. *Chemical Workers Local 1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157, at 176-77n. 17. Yet, the Ninth Circuit has itself held that punitive damages are not available under Section 301. *Williams v. Pacific Marine Association*, 421 F.2d 1287 (9th Cir. 1970). In addition, this Court and the Ninth Circuit have both stated that ERISA does not supplant Section 302(c)(5). *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982); *Hurn v. Retirement Fund Trust*, 803 F.2d 386, 391 (9th Cir. 1983). As the Court in *Hurn* put it, "ERISA was not to affect any federal laws not specifically mentioned." *Id.* In a pre-ERISA suit seeking benefits from a Taft-Hartley trust fund the Ninth Circuit has held that state laws pertaining to commercial insurance contracts are "not consistent with the federal policy of treating parties to collective bargaining contracts as parties of equal strength." *Rehmar v. Smith*, 555 F.2d 1362, 1369 (9th Cir. 1976). Lastly, as this Court has opined, and as noted in the accompanying Motion, Congress has an express policy of favoring multiemployer trusts. *NLRB v. Amax Coal Co.*, 453 U.S. at 338 n. 22.

In view of this on-going federal regulation of multiemployer trust funds, and the solicitious attitude of Congress towards these funds, it is peculiar that the Court of Appeals should adopt a rule at this late date which may ultimately lead to the demise of such funds. The imposition of punitive damages upon individual trustees of these funds is, it is submitted, plainly at odds with Section 301 and Section 302(c)(2) and the decisions of this Court thereunder. This conflict created by the decision of the Court of Appeals is exacerbated by the Court's discussion of the duties imposed by ERISA regarding the processing of benefit claims. The Court notes that these duties are in part identical to standards imposed upon labor organizations under *Vaca v. Sipes*, 386 U.S. 171 (1967) and its progeny. Yet this court has unequivocally held that punitive damages are unavailable in breach of fair representation cases. *Electrical*

Workers v. Foust, 442 U.S. 60 (1979). It is difficult to imagine that Congress intended individual fiduciaries to process claims with the same or similar standard of care obtaining in fair representation cases, and at the same time intended that disgruntled benefit claimants could secure punitive relief against individual Taft-Hartley trustees. Therefore, these Amici Curiae urge the court to accept certiorari in order to reconcile this conflict created by the Court of Appeals.

II

EXPOSING INDIVIDUAL FIDUCIARIES TO PUNITIVE DAMAGES IN BENEFIT CLAIMS CASES WILL JEOPARDIZE THE ENTIRE FIELD OF TRUST FUNDS, SINCE SUCH DAMAGES ARE UNINSURABLE IN MANY JURISDICTIONS.

Notwithstanding an express statutory provision governing suits by participants arising out of claims for benefits [ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B)], the Court of Appeals held that a participant may also characterize a denial of a claim for benefits as a breach of fiduciary duty. As such, so the Court of Appeals held, the participant may sue under ERISA Section 502(a)(2), 29 U.S.C. Section 1132(a)(2) and obtain for his or her own account the "remedial relief" against fiduciaries referred to in ERISA Section 409, 29 U.S.C. Section 1109. The Court of Appeals further concluded that this "remedial relief" encompassed both compensatory damages (such as damages for mental and emotional distress) and punitive damages.

In finding that the "remedial relief" available to benefit claimants encompassed compensatory damages, the Court of Appeals noted that such damages were recoverable against the fiduciary personally, and not as against the benefit plan itself. *Russell v. Massachusetts Mutual,* 722 F.2d at 490, n. 8. Of course, in this case, the only fiduciary sued was

Massachusetts Mutual Life Insurance Company, as distinguished from the individual members of the company's disability committee. Accordingly, the only "personal" liability which might attach in the instant case will be borne by an entity, as distinguished from any individual. Nevertheless, the Court of Appeals' rationale applies equally to individuals, such as the Trustees of These Trust funds, where they occupy fiduciary positions and are named defendants. Apparently, in the belief that it was softening the blow behind its holding, the Court of Appeals observed that "ERISA does allow for certain forms of fiduciary indemnification under Section 1110." *Id.*

Section 410 of ERISA, 29 U.S.C. Section 1110, however, does *not* in fact provide for "fiduciary indemnification" in the traditional sense of the phrase. On the contrary, ERISA made unlawful exculpatory clauses historically employed in trust indentures, designed to insulate trustees from personal liability. Thus, Section 410 expressly provides, in relevant part, that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [Part 4 of ERISA, entitled "Fiduciary Responsibility"] shall be void as against public policy." Section 410 does go on to provide that a plan may purchase insurance for itself or for its fiduciaries, *so long as* such insurance "permits recourse by the insurer against the fiduciary in case of a breach of a fiduciary obligation by such fiduciary." In addition, under Section 410, fiduciaries are permitted to buy their own insurance, or employers or unions are permitted to buy insurance for the fiduciary. In short, pursuant to Section 410, a fiduciary is permitted to obtain liability insurance, so long as someone other than the plan pays the premium. Insurance *may* be available to protect an individual trustee against claims by participants for compensatory damages. However, it will be noted that the Court of Appeals did not drop any such palliative footnote

when it concluded that individual fiduciaries were also exposed to punitive damages in benefit claims cases. This is so because, at least in the State of California where the instant case arose, an insurance carrier is barred by both statutory and decisional law from providing insurance against punitive damages.

Thus, California Civil Code § 1668 provides as follows:

"§ 1668. *Contracts contrary to policy of law.*

> CERTAIN CONTRACTS UNLAWFUL. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or wilful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of law."

§ 533 of the California Insurance Code similarly provides as follows:

> § 533. *Wilful act of insured; negligence.*
>
> An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or the insured's agent or others."

The California courts have concluded that these two code sections prevent an individual from insuring against punitive damages. *City Products Corp. v. Globe Indemnity Co.*, 88 Cal.App.3d 31 (1979); *Ford Motor Co. v. Home Insurance Co.*, 116 Cal.App.3d 374 (1981); *Peterson v. Superior Court*, 31 Cal.App.3d 147 (1982). Moreover, even if a policy of insurance by its terms expressly includes coverage for punitive damages, an insurance carrier is still not liable to indemify an insured against a judgment for punitive damages. Thus, in the *City Products* case, for example, the policy in dispute covered "*all sums* the insured shall become legally obligated to pay as damages." [Emphasis supplied]

Id. at 33. Notwithstanding the breadth of coverage contained in the contract of insurance, the court in *City Products* reasoned as follows:

> "The policy considerations in a state where . . . punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, as compensatory damages already have made the plaintiff whole."

City Products, 88 Cal.App.3d 31, 39, *quoting Northwestern National Casualty Co.*, 307 F.2d 432 (5th Cir. 1962).

Accordingly, in California, punitive damages imposed under the standard enunciated by the Court of Appeals will rest ultimately as well as nominally on the individual Taft-Hartley trustees who have volunteered their time for the betterment of the industry. The *in terrorem* effect of being exposed to such personal financial jeopardy, in the face of ultimate responsibility for processing hundreds of thousands of claims, will deter all but the most doughty — or the most foolhardy — from serving a trusteeship.

III.

A COURT SHOULD NOT IMPLY A CONGRESSIONAL INTENT TO PERMIT THE RECOVERY OF PUNITIVE DAMAGES, WHERE SUCH RELIEF WILL IMPACT DISPARATELY AMONG THE SEVERAL STATES.

While California will leave Taft-Hartley trustees personally exposed to punitive damages, in other jurisdictions individual fiduciaries will not function under such a spectre. Thus, at least 14 states have concluded that an individual

may insure against punitive damages: (1) Arizona, *Price v. Hartford Accident & Indemnity Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); (2) Arkansas, *California Union Ins. Co. v. Arkansas Louisiana Gas Co.*, 264 Ark. 449, 572 S.W.2d 393 (1978); (3) Georgia, *Greenwood Cemetery, Inc. v. Travelers Indem. Co.*, 238 Ga. 313, 232 S.E.2d 910 (1977); (4) Idaho, *Abbie Uriquen Oldsmobile Buick, Inc. v. United States Fire Ins. Co.*, 95 Idaho 501, 511 P.2d 783 (1973); (5) Iowa, *Cedar Rapids v. Northwestern Nat. Ins. Co.*, 304 N.W.2d 228 (1981); (6) Kentucky, *Continental Ins. Co. v. Hancock*, 507 S.W.2d 146 (1973); (7) Louisiana, *Fagot v. Ciravola*, 445 F.Supp. 342 (ED La 1978); (8) Maryland, *First National Bank v. Fidelity & Deposit Co.*, 283 Md. 228, 389 A.2d 359 (1978); (9) Mississippi, *Anthony v. Frith*, 394 S.2d 867 (1981); (10) Oregon, *Harrell v. Travelers Indemn. Co.*, 279 Or. 199, 567 P.2d 1013 (1977); (11) Tennessee, *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964); (12) Texas, *Ridgway v. Gulf Life Ins. Co.*, 578 F.2d 1026 (5th Cir. 1978); (13) Vermont, *State v. Glens Falls Ins. Co.*, 137 Vt. 313, 404 A.2d 101 (1979); (14) West Virginia, *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (1981).

On the other hand, and in addition to California, at least 12 states have concluded that liability insurance coverage for an award of punitive damages is void as against public policy: (1) Colorado, *Universal Indem. Ins. Co. v. Tenery*, 96 Colo. 10, 39 P.2d 776 (1934); (2) Connecticut, *American Ins. Co. v. Saulnier*, 242 F.Supp. 257 (D.C. Conn. 1965); (3) Florida, *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981); (4) Illinois, *Beaver v. Country Mutual Ins. Co.*, 95 Ill.App.3d 1122, 420 N.E.2d 1058 (1981); (5) Indiana, *Grant v. North River Ins. Co.*, 453 F.Supp. 1361 (N.D. Ind. 1978); (6) Kansas, *American Surety Co. v. Gold*, 375 F.2d 523 (10th Cir. 1966); (7) Minnesota, *Wojciak v. Northern Package Corp.*, 310 N.W.2d 675 (1981); (8) Missouri, *Crull v. Gleb*, 382 S.W.2d 17 (1964); (9) New Jersey, *Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co.*, 172 N.J.Super 10, 410 A.2d 696 (1980); (10) New York, *Parker v. Agricultural Ins. Co.*, 109 Misc.2d 678, 440 N.Y.S.2d 964 (1981); (11) Pennsylvania, *Esmond v. Liscio*, 209 Pa. Super. 200, 224 A.2d 793 (1966); (12) Virginia, *Northwestern Nat. Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962).

Based on the foregoing, it is clear that the rule adopted by the Court of Appeals, were it to be embraced by other Circuits (which it has not), would fall unevenly upon individual fiduciaries, depending on the fortuity of which state law governed the terms of any contract of insurance. The Court of Appeals ruling will even have a disparate impact within the Ninth Circuit, for it will be noted from the foregoing that the states of Arizona, Idaho and Oregon each permit insurance against punitive damages, whereas California does not.

It may be urged that the argument herein cuts too far, for if adopted it would preclude Congress from ever enacting a statute calling for punitive relief because of the disparate impact such a statute may have among the several states. However, such a broad proposition is not advocated herein. Rather, because of the disparate impact among the several states, it should not lightly be presumed that Congress intended punitive relief be available, particularly where, as in the instant case, there is scanty evidence of any such Congressional intention.

IV

THE JUDICIARY SHOULD NOT FASHION NEW REMEDIES IN THE FACE OF A COMPREHENSIVE LEGISLATIVE SCHEME

As set forth in the Petition for Certiorari (at p. 13), ERISA describes a comprehensive and elaborate scheme for enforcement, which nowhere mentions punitive damages.

In an analogous context, this Court recently had occasion to pass upon the propriety of implying an additional remedy into a comprehensive legislative scheme. *Northwest Airlines v. Transport Workers Union,* 451 U.S. 77 (1981); see also, *Texas Industries v. Radcliffe,* 451 U.S. 630 (1981). In *Northwest Airlines,* the issue was whether the Equal Pay Act or Title VII of the 1964 Civil Rights Act would permit a defendant to seek indemnification or contribution from a third party. In holding that these statutes would not permit such a remedy, this Court opined as follows:

> "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. Both the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are such statutes. The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs."
> *Id.*, 451 U.S. at 97.

It is hard to imagine a more comprehensive legislative scheme than ERISA. When the requirements of § 302(c)(5) are added to those of ERISA, it becomes even clearer that judicially crafted remedies are unwarranted.

CONCLUSION

Based on the foregoing, together with the arguments advanced in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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Attorneys for Amici Curiae Southern California Pipe Trades Trust Funds, Southern California IBEW-NECA Trust Funds, Air Conditioning and Refrigeration Industry Trust Funds, and Southern California Floor Covering Trust Funds

August 3, 1984

No. 84-9

IN THE
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OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY
and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In urging this Court to issue a writ of certiorari, petitioners demonstrated both the extensive confusion existing in the lower courts over whether ERISA permits awards of punitive or extra-contractual damages against fiduciaries in the benefit claims context as well as the extraordinary importance this question holds for the proper administration of employee benefit plans. In her response, respondent concedes the validity of these contentions and, indeed, joins petitioners in urging this Court to review the Ninth Circuit's judgment. While respondent goes on to maintain that the Ninth Circuit's decision should be affirmed, the arguments which she marshals in support of this position not only highlight the need for urgent clarification of the issues raised by the petition,

but also offer compelling grounds for overturning the Ninth Circuit's judgment.

1. Throughout her response, respondent endeavors to portray the facts underlying this case as something more than a "simple and routine" dispute over employee benefits. Yet, any reasonable reading of the record demonstrates the decidedly common nature of the factual events. The respondent, Mrs. Russell, initially began receiving short-term disability benefits based on her representation that she was suffering from a back ailment. Three months later, when Russell's disability had failed to abate, Mass Mutual's Disability Committee, acting as prudent fiduciaries, sought independent verification of her illness. When the resulting examination report indicated that Russell was not disabled, her benefits were discontinued. Russell then invoked the plan's claims appeal procedure and brought additional information before the Committee. Based upon this new data, as well as an independent psychiatric examination, her benefits ultimately were restored retroactively to the date of their discontinuance.

Notwithstanding respondent's contentions, it is difficult to imagine a more archetypical benefit claims case or a more classic example of the orderly internal resolution of a benefit claims dispute. Indeed, the only thing atypical is the fact that the parties are still embroiled in litigation more than four years *after* respondent's benefits were restored in full. As demonstrated in the petition, such a result can only undermine the internal dispute resolution process which Congress mandated as essential to ERISA. *See* ERISA § 503, 29 U.S.C. § 1133 (1982). As with any administrative process, this claims review procedure is designed to foster an informal exchange of information, with the goal of allowing benefit plans to correct any inadvertent or misinformed decisions in the first instance, thereby permitting both the participant and the plan to avoid unnecessary and costly litigation. *See,*

e.g., Kross v. Western Electric Co., 701 F.2d 1238, 1244-45 (7th Cir. 1983); *Amato v. Bernard*, 618 F.2d 559, 567-68 (9th Cir. 1980); *Lucas v. Warner & Swasey Co.*, 475 F. Supp. 1071, 1074 (E.D. Pa. 1979); *Taylor v. Bakery & Confectionary Union & Industry International Welfare Fund*, 455 F. Supp. 816, 819-20 (E.D.N.C. 1978). If litigation, including claims for punitive relief, nonetheless may be predicated on initial decisions which are later corrected, then the objectives served by this internal review will be largely negated, a contention that respondent fails even to address in her response.

2. Despite her efforts to support the decision below, respondent can point to *no* provision in ERISA which authorizes an award of punitive or extra-contractual compensatory relief against individual fiduciaries, arising from a dispute over benefits. Indeed, respondent mentions Section 409—the statutory basis for damages relied upon by the Ninth Circuit—only once in passing and then seizes upon the phrase "equitable or remedial relief" as grounds for allowing punitive damages, notwithstanding that such relief has never been viewed as either remedial or equitable in nature.[1] Moreover, respondent totally ignores the fact that both the remaining language of Section 409 and its legislative history make clear that Section 409 authorizes recovery solely on behalf of the plan itself, and not individual participants.

Nor does the legislative history of ERISA otherwise suggest that punitive damages against fiduciaries might be appropriate.[2] As this Court has stated time and time again, without some express manifestation of

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[1] Indeed, respondent admits that making punitive damages available against fiduciaries would serve only a "deterrent purpose," and not an equitable or remedial function. *See* Response to Petition at 35.

[2] Respondent relies upon statements in the legislative history that Congress intended "to provide the full range of legal and equitable remedies available in both state and federal courts" to remedy breaches of fiduciary duty. *See* Response to Petition at 22.

intent on the part of Congress, remedies not specifically authorized by statute will not be created. *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981). In particular, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when [as here] Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."[3] *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981).

This language, however, had its genesis in an earlier version of ERISA which provided for "[c]ivil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary . . . ." *See* H.R. 2, 93d Cong., 2d Sess. (1974), *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 94th Cong., 2d Sess., Vol. III at 3816 (1976). The civil enforcement provisions ultimately passed in ERISA were far more circumscribed, providing participants and beneficiaries with an opportunity to recover only contractual benefits under the plan, and other equitable relief under Section 502(a)(1) and (2), and not individualized damages against a fiduciary.

[3] Indeed, where Congress desired to provide for punitive-type remedies in ERISA, it did so explicitly. Under Section 502(g)(2), Congress provided an award of liquidated damages against employers who fail to make contributions to multiemployer plans, as required by the plan documents. ERISA § 502(g)(2)(C), 29 U.S.C. § 1132(g)(2)(C) (1982). Further, this section specifically confers upon the court discretion to order such other "*legal* or equitable relief" as it deems appropriate. ERISA § 502(g)(2)(E), 29 U.S.C. § 1132(g)(2)(E) (1982) (emphasis added). In addition, where administrators fail to comply in a timely manner with a proper request for information, they may be assessed a statutory penalty under ERISA of up to $100 per day. *See* ERISA §§ 502a)(1)(A), (a)(4), (c), 29 U.S.C. §§ 1132(a)(1)(A), (a)(4), (c) (1982). No such relief is available either in the remaining enforcement provisions of Section 502 governing benefit claims disputes or in Section 409. Thus, Congress must have determined that these harsh remedies were inappropriate for actions arising in the benefit claims context.

3. Respondent also has failed totally to rebut petitioners' demonstration that the lower court's decision will have a severe detrimental impact on the administration of both employee benefit plans and the courts. In particular, respondent's argument that punitive damages will actually be awarded only in limited circumstances and that prudent fiduciaries will have nothing to fear from the availability of such awards misses the mark entirely. As a threshold matter, despite the seemingly stringent standard governing the availability of such relief, punitive damage awards have become commonplace in litigation and often have been assessed in wholly arbitrary and unpredictable amounts. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979); Brief of Amici Curiae American Council of Life Insurance and Health Insurance Ass'n of America at 13-19; Brief of Amici Curiae Alaska Fishermen's Union-Salmon Canners Pension Trust, et al. at 19-20. Even more importantly, it is not the actual imposition of punitive damages in particular cases that threatens to disrupt the efficient administration of employee benefit claims. Rather, it is the specter of punitive damage awards and the concomitant proliferation of litigation seeking punitive damages which poses the most severe harm.

Nor, as respondent suggests, are these likely consequences "mere speculation." *See* Response to Petition at 40. This Court has long taken judicial notice of the adverse effects accompanying punitive damage awards, including the disruption of responsible decisionmaking, the resulting restraints placed on internal resolution of disputes, *see International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 51-52 (1979), and the encouragement of unnecessary litigation, *see Smith v. Wade*, 103 S.Ct. 1625, 1642 (1983) (Rehnquist, J., dissenting). Moreover, as amici curiae have pointed out, disgruntled participants, taking their cue from the Ninth Circuit, have already begun to file claims for extra-

contractual compensatory damages, such as mental pain and suffering, and punitive damages arising from benefit disputes in federal courts in the Ninth Circuit. *See* Brief of Amici Curiae Pipe Trust, et al., at 8. Thus, this opinion can be sure to inspire a dramatic increase in litigation, which can only impair the financial stability of employee benefit plans while unnecessarily burdening the federal courts.[4]

For the foregoing reasons, as well as the grounds advanced in the petition and by the amici curiae, a writ of certiorari should issue to review the opinion of the Ninth Circuit.

Respectfully submitted,

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[4] Moreover, contrary to respondent's contentions, imposing unpredictable punitive damage awards against fiduciaries is unnecessary to further the policies underlying ERISA. As petitioners have demonstrated, far from being immunized from liability for misconduct, ERISA fiduciaries are subject to a wide range of statutory and regulatory remedies, including personal liability for losses to the plan arising from a breach of fiduciary duty, removal of the fiduciary and imposition of criminal penalties. *See* Petition at 13-14. Further, in circumstances involving gross misconduct, fiduciaries could be compelled to pay the attorneys' fees and costs for prevailing participants or beneficiaries in benefit claims cases. *See* ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1982). These provisions are more than adequate to deter fiduciaries from misconduct in the administration of employee benefit plans, particularly since they are often uncompensated for their services and have no financial stake in the outcome of benefit claims disputes.

(9)

No. 84-9

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
and CECILIA STEVENSON,
Petitioners,

vs.

DORIS RUSSELL,
Respondent.

BRIEF OF 35 MULTI-EMPLOYER TRUST FUNDS AS AMICI CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages for improper or untimely processing of benefit claims?

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No. 84-9

In the Supreme Court

OF THE

United States

October Term, 1984

Massachusetts Mutual Life Insurance Company, and Cecilia Stevenson,
Petitioners,

vs.

Doris Russell,
Respondent.

BRIEF OF AMICI CURIAE SUPPORTING REVERSAL

Now come the Amici Curiae, Construction Laborers Pension Trust for Southern California, Laborers Health & Welfare Trust for Southern California, Construction Laborers Vacation Trust for Southern California Laborers Training and Retraining Trust for Southern California, California Field Ironworkers Pension Trust, California Field Ironworkers Welfare Plan, Carpenters Pension Trust for Southern California, Carpenters Health & Welfare Trust for Southern California, 11 County Carpenters Vacation Savings and Holiday Plan, Southern California Provision Industry Health & Welfare Trust Fund, Butchers and Provision Workers Pension Fund of Southern California, Joint Council of Teamsters No. 42 Welfare Trust Fund, Teamsters and Food Employers Security Trust Fund, Southern California United Food and Commercial Workers Unions and Food Employers Benefit Fund, Southern California United Food and Commercial Workers Unions and Food

Employers Supplementary Unemployment and Supplementary Disability Benefit Fund, Southern California United Food and Commercial Workers Unions and Food Employers Joint Pension Trust Fund, U.F.C.W. Local 711 and Retail Food Employers Benefit Fund, Retail Food Employers and U.F.C.W. Local 711 Pension Trust Fund, Retail Food Employers and Meatcutters Local 457 Benefit Fund, Food Employers and Bakery and Confectionery Workers Benefit Fund of Southern California, Valley Clerks Health & Welfare Trust Fund, Northern California Retail and Food Clerks Unions and Food Employers Joint Pension Trust Fund, Northern California Retail Clerks Unions-Employers Vacation Fund, Northern California Retail Clerks Union and Food Employers Supplementary Payment Fund, Northern California Food Employers and Retail Clerks Unions Benefit Fund, Retail Clerks Specialty Stores Pension Fund, Northern California Area Retail Clerks Unions-Employers Welfare Fund, Northern California Pharmacists, Clerks and Drug Employers Pension Fund, Northern California Registered Pharmacists Pension Fund, Southern California Meatcutters Unions and Food Employers Benefit Trust Fund, Southern California Meatcutters Unions and Employers Pension Fund, Gemco-Retail Clerks Unions Pension Fund, Gemco-Retail Clerks Unions Welfare Trust, California Butchers Pension Trust Fund, and Northern California Butchers Unions and Employers Health Trust Fund (the "Trust Funds") and submit this brief in support of reversal in USSC No. 84-9, pursuant to Rule 36.2.

The written consents of the parties has previously been filed with the Clerk of the Court.

I.

INTEREST OF THE AMICI CURIAE

1. The Trust Funds are multiemployer trust funds established pursuant to the provisions of Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 186(c). All of the Trust Funds are employee benefit funds within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001, *et seq.*, and are subject to federal regulation pursuant to the provisions of ERISA.

2. There are over two hundred fifty thousand participants in the Trust Funds; annually, over $40,000,000.00 is contributed to the Trust Funds on behalf of these participants.

3. Each of the Trust Funds is administered by a board of trustees; the trustees, who serve without compensation, are "fiduciaries" within the meaning of ERISA, 29 U.S.C. Section 1002(21)(A). The trustees of each Trust Fund are charged with the responsibility of administering the benefit plans promulgated by the Trust Funds in a manner consistent with the terms of such plans and in compliance with ERISA and other applicable provisions of federal law. The trustees of the Trust Funds annually process thousands of benefit claims.

4. The Trust Funds believe that the Ninth Circuit's holding in *Russell* that punitive damages may be awarded against the trustees of ERISA-regulated trust funds for failure to properly process benefit claims is incorrect as a matter of law, and should be reversed by this Court.[1] They further believe that the practical effect of the

[1]*Russell* involved two single-employer employee benefit plans. But the across-the-board rule announced by the Ninth Circuit regarding liability for punitive damages would apply to fiduciaries of multiemployer trust funds, as well.

holding of the Ninth Circuit in *Russell* will be to discourage all responsible individuals from serving as trustees of ERISA-regulated benefit plans, because such service would expose them to liability for punitive damages for which they may not obtain insurance and for which, in some circumstances, they may not seek reimbursement from the trust funds. The Trust Funds further believe that the ultimate impact of the Ninth Circuit's decision will be to undermine the financial stability of ERISA-regulated trust funds, in ways described in detail in the accompanying brief.

5. These amici curiae are in a unique position to advise the Court with regard to the implications of the *Russell* decision, because of their intimate familiarity with the role of fiduciaries in the handling of employee benefit claims in ERISA-regulated employee benefit trust funds.

II.

SUMMARY OF ARGUMENT

1. As a matter of statutory construction, the U.S. Court of Appeals for the Ninth Circuit erred in concluding that punitive damages may be sought by claimants who allege that the trustees of employees benefit plans improperly processed their benefit claims.

a. Neither the text of ERISA nor its legislative history supports the conclusion that punitive damages may be awarded in such cases.

b. As a matter of public policy, the courts should not engraft a right to punitive damages on the existing statutory scheme, which provides full relief to all claimants.

c. The traditional rationales which support the award of punitive damages in non-ERISA actions are absent in cases brought by claimants against employee

benefit plans seeking relief under sections 502 and 409 of ERISA.

2. Considerations of public policy overwhelmingly militate against the award of punitive damages in cases seeking relief under sections 502 and 409 of ERISA.

a. As a practical matter, no responsible individual will agree to act as a trustee of an employee benefit plan if the *Russell* decision is upheld. Such trustees receive no compensation for their service, but they would nevertheless be exposed to liability for punitive damages; in most jurisdictions, they will be unable to obtain insurance to protect themselves against direct liability for such damages. Actively discouraging the participation of capable people as trustees of employee benefit plans runs counter to the principal purpose of ERISA, which was to insure responsible fiduciary administration of such plans.

b. Although trustees of employee benefit plans may, in certain limited circumstances, be able to obtain indemnification from their funds against punitive damage claims, the cost of defending such claims will be a significant drain on the resources of the plans. Both ERISA and the subsequent Multi-employer Pension Plan Amendments Act of 1980 were enacted, in large part, because of Congress' recognition that employee benefit plans already have severe financial difficulties.

c. Because punitive damages are an open-ended type of remedy, and because the *Russell* decision invites each benefit claimant to "tack on" a claim for punitive damages in every suit filed against an employee benefit trust, the liability of the trustees will become immeasurable.

III.

ARGUMENT

A. As a Matter of Statutory Construction, the Ninth Circuit Erred in Holding That Punitive Damages are Recoverable Under Sections 409 and 502 of ERISA.

1. The Plain Language of the Statutes and the Legislative History Do Not Support the Inference that Punitive Damages are Available.

As this Court has repeatedly held, the starting point for construing federal statutes is always the statutory language itself; *see, e.g., Ernst and Ernst v. Hochfelder,* 425 U.S. 185, 197 (1976); *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 558 (1979). In its opinion in *Russell,* the Ninth Circuit quotes portions of Sections 409 and 502 of ERISA, but does not attempt to parse the statutes to determine whether, by their literal terms, they afford a basis for awarding punitive damages. 722 F.2d at 490-491.[2]

The *Russell* opinion notes that Section 409(a) provides that a fiduciary "shall be subject to such . . . equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary,[3] and that Section 502(a)(2) permits the Secretary of Labor, or a participant,

[2]The discussion of punitive damages in the *Russell* opinion does not specify precisely which provisions of ERISA the court believes would support a claim for punitive damages; *Russell, supra,* 722 F.2d at 490-492. The cases cited in the discussion in *Russell* refer to Sections 409, 410 and various portions of Section 502 of ERISA. The failure to specify the statutory source of the right to claim punitive damages makes the court's analysis all the more puzzling.

[3]As Petitioner notes, the language of Section 409 of ERISA indicates that the rights provided therein are bestowed upon the benefit plan itself, not upon individual beneficiaries. (See Petition p. 9).

beneficiary or fiduciary to seek "appropriate relief under Section 1109 of this title." 722 F.2d at 488.

Neither of these statutory provisions contain any language which would suggest that Congress thought that punitive damages would be a form of "appropriate relief."

To justify its conclusion that punitive damages should be available as a remedy for ERISA violations, the Ninth Circuit's opinion notes that the Senate and House Committee reports on ERISA show that the Act was intended to provide "the full range of legal and equitable remedies available in both state and federal courts.[4] But the language quoted by the Court begs the question of what the "range" of remedies ought to be in an action such as *Russell.*[5] Suits by beneficiaries of employee benefit plans are fundamentally actions in contract. The accepted rule is that actions for breach of contract do not give rise to claims for punitive damages. *See Restatement (2nd) of Contracts,* Section 369 (Tentative Draft no. 14, March, 1979).

[4]722 F.2d at 491, citing H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 17, reprinted in 1974 U.S. Code Cong. and Ad. News, 4639, 4655, Sen. Rep. No. 93-127, 93d Cong., 1st Sess. 35, reprinted in 1974 U.S. Code Cong. and Ad. News, 4838, 4871.

[5]The *Russell* opinion points to the reference to "sanctions" in Section 1 of ERISA, 29 U.S.C. Section 1001(b), as evidence of Congress' intent to provide for the imposition of punitive damages against fiduciaries. But ERISA contains its *own* "sanctions," including removal of fiduciaries (Section 409(a)), restitution (*Id.*) and monetary fines (Sections 501 and 502(c)). There is no reason to suppose that Congress intended fiduciaries to be subject to "sanctions" *in addition* to those explicitly set forth in ERISA. *Cf. Green v. Wolf Corporation,* 406 F.2d 291, 303 (2d Cir. 1968) [punitive damages not recoverable for a violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b) since, *inter alia,* "the Securities Exchange Act of 1934 contains provisions imposing criminal penalties on violators"].

Moreover, Section 502(a)(3) of ERISA, 29 U.S.C. Section 1132(a)(3), contains language suggesting that Congress intended disappointed benefit claimants to be limited to equitable and injunctive relief.[6] Section 502(a)(3) authorizes a beneficiary to bring an action "to enjoin any act or practice which violates any provision of this sub-chapter or the terms of the plan or (B) to obtain *other appropriate equitable* relief (i) to redress such violations or (ii) to enforce any provisions of this sub-chapter or the terms of the plan ..." [Emphasis supplied]. Courts which have considered the issue have concluded that suits by beneficiaries under Section 503(a)(1)(B) and 503(a)(3) to obtain plan benefits are equitable, rather than legal, in nature; *see e.g., Wardle v. Central States, Southeast and Southwest Areas Pension Fund,* 627 F.2d 820, 829 (7th Cir. 1980), *cert. denied,* 499 U.S. 1112 (1981) ["We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable." 627 F.2d at 829]. Punitive damages are almost universally considered to be a form of legal, rather than equitable, relief. *See, e.g., Walker v. Ford Motor Co.,* 684 F.2d 1355 (11th Cir. 1982).

[6]Participants and beneficiaries of multiemployer benefit plans may also have a cause of action under 301 of the Labor Management Relations Act of 1947, as amended 29 U.S.C. Section 185(a), when plan benefits are wrongfully denied. *See, e.g., Rehmar v. Smith,* 555 F.2d 1362 (9th Cir. 1976). In such cases, the instrument creating the multiemployer benefit trust is, itself, a form of collective bargaining agreement. Many lower courts have held that actions under Section 301 do not give rise to a claim for punitive damages; *see, e.g., Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO v. Michaelson's Food Services, Inc.,* 545 F.2d 1248, 1254 (9th Cir. 1976); *Badon v. General Motors Corporation,* 679 F.2d 93 (6th Cir. 1982); *Sanabria v. International Longshoremen's Association Local 1575,* 597 F.2d 312, 314 (1st Cir. 1979).

An analogous statutory construction has been made by the courts in interpreting Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) - 5(g). That statute provides that a court, upon a finding of liability, may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay ... or any other equitable relief as the court deems appropriate." The courts have held, with near unanimity, that this language does not authorize the award of punitive damages; *see Shah v. Mt. Zion Hospital and Medical Center,* 642 F.2d 268, 272 (9th Cir. 1981); *DeGrace v. Rumsfeld,* 614 F.2d 796, 808 (1st Cir. 1980); *Harrington v. Vandalia-Butler Board of Education,* 585 F.2d 192, 194 (6th Cir. 1978), *cert. denied,* 441 U.S. 392 (1979); *Pearson v. Western Electric Co.,* 542 F.2d 1150 (10th Cir. 1976). *See also Pfeiffer v. Essex Wire Corp.,* 682 F.2d 684 (7th Cir.), *cert. denied,* 459 U.S. 1039 (1982) [no punitive damages awardable under Age Discrimination in Employment Act.] By parity of reasoning, punitive damages also should not be available under the similar provisions of Section 502 of ERISA.

2. The Court Should Not Engraft A Right to Punitive Damages Onto The Existing Statutory Scheme.

The Ninth Circuit's decision in *Russell* ignores this Court's repeated warnings to lower courts not to gratuitously expand detailed statutory remedial schemes. The remedial scheme set forth in ERISA is complex and extensive; there is simply no basis for the assumption that Congress intended the courts to add additional remedies:

> "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97 (1981).

See also Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19:

> "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

Amici have searched the legislative history in vain for any indication that Congress expected punitive damages would be awardable under Section 502. So far as amici can ascertain, there are no statements in the record which directly authorize such damages. ERISA is not an act which was drafted in haste; *see generally* Legislative History of The Employee Retirement Income Security Act of 1974 (Committee print compiled by the Senate Committee on Labor and Public Welfare). It is highly improbable that Congress intended the extraordinary remedy of punitive damages to be available to disappointed benefit claimants bringing suit under Section 502, but simply "forgot" to mention it in both the statute and its legislative history.

3. The Absence of a Rationale for Punitive Damages.

When ambiguity exists with regard to whether punitive damages may be awarded, this Court has frequently looked to considerations of public policy to determine whether such damages are available. *See, e.g., Smith v. Wade*, ___ U.S. ___, 103 S.Ct. 1625 (1983); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The Ninth Circuit's decision in *Russell* betrays no serious effort to balance the competing policy considerations which are traditionally weighed in determining whether punitive damages should be permitted.

Moreover, none of the traditional public policy rationales for permitting punitive damages would appear to apply to claims by beneficiaries under Section 502 of ERISA.

This Court has often stated that punitive damages are designed to punish and deter outrageous conduct. *Smith v. v. Wade*, ___ U.S. ___, ___, 103 S.Ct. 1625, 1636 (1983). It is extremely difficult to ascertain how "punishment" of fiduciaries will further any legitimate purpose of ERISA. As already noted, the trustees of multiemployer plans serve without compensation;[7] they derive no material benefit from the grant or denial of any benefit claim by a trust fund participant. In such a context, it is difficult to imagine that a trustee would engage in "outrageous" conduct. If the trustee fails to perform his obligations in a timely manner, or according to the trust provisions, injunctive relief may be obtained from a federal court to compel him to do so. *See* ERISA Section 502(a)(3). If the trustee's conduct constitutes a breach of fiduciary duty, he may be permanently removed. *See* ERISA Section 409. In these circumstances, the traditional concepts of "punishment" and "deterrence" would appear to have little utility. A trustee's dereliction of an ERISA imposed duty entitles a trust participant to prompt and effective injunctive and equitable judicial relief.

A second policy rationale for the imposition of punitive damage awards arises in cases where the defendant may derive great profit from outrageous conduct. *See, e.g., Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 698 (1967). In such circumstances, the courts reason, the defendant may find it financially attractive to run the risk of paying mere general damages for wrongful conduct, since such damages will be small in comparison to the profits such conduct generates. In these circumstances, punitive

[7]ERISA Section 408(c)(2), 29 U.S.C. Section 1108(c)(2).

damages may be the only effective tool for curtailing such actions. But no such considertaion is present here. The trustees do not profit from the grant or denial of individual benefit claims, and have no prospect of realizing any financial gain, great or small, from administration of an employee benefit plan.

Several states recognize a third public policy rationale for the award of puntive damages. In such jurisdictions, punitive damages may be granted because the "American rule" generally precludes successful plaintiffs from recovering attorneys' fees. *See*, Ghiardi and Kircher, *Punitive Damages*, § 2.11 (Callaghan 1983). That consideration is not present in suits brought under Section 502 of ERISA, since federal courts will have the discretion to award attorneys' fees to a successful claimant in appropriate cases. ERISA Section 502(g)(1), 29 U.S.C. Section 1132(g)(1).

The *Russell* opinion implies that federal courts might "borrow" principles of state law in evaluating punitive damage claims under Section 502 of ERISA. 722 F.2d at 491-492. The difficulty with this approach is that the state courts are in wide disagreement over the availability of punitive damages. Some states, such as Connecticut and Michigan, appear to view punitive damages as compensatory in nature; *see, e.g., Collend v. New Canaan Water Co.*, 155 Conn. 477 (1967) [Connecticut law]; *National Semiconductor v. Allendale Mutual Insurance Co.*, 549 F.Supp. 1195 (D.Conn. 1982) [same]; *Willett v. Ford Motor Co.*, 400 Mich. 65 (1977) [Michigan law]; *Postill v. Booth Newspapers, Inc.*, 118 Mich.App. 608 (1982) [same]. Other states, such as California, view punitive damages as a means of punishment and deterrence of future misconduct; *see, e.g.*, California Civil Code Section 3294. Still other states, such as Massachusetts and Louisiana, do not permit an award of punitive damages at all, except in narrow categories of cases where they are specifically authorized by

statute, *see, e.g., Schiller v. Strangis*, 540 F.Supp. 605 (D. Mass. 1982) [Massachusetts law]; *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293 (5th Cir. 1982) [Louisiana law].

To the extent that the *Russell* opinion suggests that state law doctrines may furnish guidance on the awardability of punitive damages, it invites federal courts to thread their way through a maze of hopelessly inconsistent and conflicting state doctrines. Such a course is grossly inconsistent with Congress' desire to provide for uniformity in the administration of ERISA-regulated trust funds.

B. As a Matter of Public Policy, Punitive Damages Should Not be Recoverable for ERISA Violations.

Amici have already noted the conspicuous absence of any legislative history which would countenance the recovery of punitive damages against fiduciaries for ERISA violations. In addition, there are positive considerations of public policy which militate against the availability of such damages. The following is the brief discussion of salient considerations:

1. Impact on Trustee Service.

The most dramatic and obvious result of the Ninth Circuit's decision in *Russell* will be to cause responsible individuals to refuse to serve as trustees of employee benefit plans. The possibility of being personally liable for paying punitive damage awards without predictable limits is enough to discourage any prudent individual from agreeing to serve as a trustee of an employee benefit plan.[5]

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[5]Permitting disappointed benefit claimants to seek punitive damages against fiduciaries of employee benefit trusts also raises the specter of claims founded on theories of vicarious liability. In large employee benefit trust funds, much of the day-to-day claims administration work is performed by nonfiduciary employees, who are

In many jurisdictions, it appears that the trustees could not obtain any insurance which would protect them from a punitive damage award. As a matter of public policy, the states of California, Illinois, Missouri, New York, New Jersey, Florida, Virginia and Colorado forbid defendants from obtaining insurance reimbursement for sums awarded as punitive damages. *See, e.g., Northwestern National Insurance Co. v. McNulty,* 307 F.2d 432 (5th Cir. 1962) [applying Florida and Virginia law]; *Hartford Accident and Indemnity Co. v. U.S. Concrete Pipe Co.,* 369 So.2d 451 (Fla.App. 1979) [Florida law]; *City Products Corp. v. Globe Indemnity Co.,* 88 Cal.App.3d 31 (1979) [California law]; *Ford Motor Co. v. Home Insurance Co.,* 116 Cal.App.3d 374 (1981) [same]; *Hartford Accident and Indemnity Co. v. Village of Hempstead,* 48 N.Y.2d 218, (1979) [New York law]; *Brown v. Western Casualty and Surety Co.,* 484 P.2d 1252 (Colo.App. 1971) [Colorado law]; *Crull v. Gleb,* 382 S.W.2d 17 (Mo.App. 1964) [Missouri law]; *Variety Farms v. New Jersey Manufacturers Insurance Co.,* 172 N.J.Super. 10, 410 A.2d 696 (1980) [New Jersey law]; *Beaver v. Country Mutual Insurance Co.,* 95 Ill.App.3d 1122, 420 N.E.2d 1058 (1981) [Illinois law].

Given the possibility that service as a trustee might result in a punitive damage award for which the trustee would have no protection, it taxes the imagination to envision any intelligent individual accepting such a position, especially in view of the fact that the trustees receive no compensation for their services.

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supervised by and report to the plan's fiduciaries. As a practical matter, the plan fiduciaries cannot review every minute detail of plan administration carried out by such staff personnel. Yet the rule of *Russell* would suggest that plan fiduciaries may be sued by disappointed benefit claimants who are displeased with the way in which staff members have processed their claims. Such "vicarious liability" claims have met with harsh criticism from legal commentators; *see, e.g.,* Prosser, *Torts,* (4th Ed.), p. 12.

2. Impact on Costs of Administration.

As the Ninth Circuit opinion in *Russell* notes, trustees have limited rights to indemnification under section 410 of ERISA, 29 U.S.C. Section 1110. The principal mechanism which Section 410 permits employee benefit plans to utilize to protect fiduciaries is the purchase of insurance. As discussed above, in many jurisdictions insurance is not available to cover claims for punitive damages. But even if one were to assume that Section 410 would permit employee benefit plans to fully protect their trustees, the result would be far from desirable. Such protection would be an extra cost to the plan, and thus a drain on plan resources. One of the principal purposes of ERISA was to strengthen the financial underpinning of employee benefit plans; *see, e.g., Nachman v. Pension Benefit Guaranty Corporation,* 446 U.S. 395, (1980); *Oregon-Washington Carpenters Pension Trust v. R.A. Gray & Co.,* ___ U.S. ___, ___, 104 S.Ct. 2709, 2713-2715 (1984). It is surely contrary to the purpose of ERISA to saddle employee benefit plans with open-ended liabilities which go beyond making an employee whole. Providing adequate protection against punitive damage claims, either through the purchase of insurance or through direct indemnification of fiduciaries, is certain to significantly increase the costs of administering employee benefit plans, in contravention of ERISA's clear intent.[9]

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[9]In *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 267, this court stated that "an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort." By the same token, an award of punitive damages against the fiduciaries of a trust fund really "punishes" only the participants because (1) responsible individuals will not be willing to serve as fiduciaries unless they are insured or indemnified against punitive damage awards; and (2) if the trust must indemnify the trustees against punitive damages, or purchase insurance for them, the cost is ultimately borne by the trust beneficiaries themselves.

Furthermore, if punitive damages are permitted, fiduciaries may be forced to defend themselves against a string of *seriatim* punitive damage claims brought by individual participants, each complaining of the same incident of misconduct. Several circuit courts have noted that such potential multiple punitive damage recoveries can be financially ruinous to a defendant; *see, e.g., de Haas v. Empire Petroleum Company,* 435 F.2d 1223, 1231 (10th Cir. 1971); *Globus v. Law Research Service, Inc.,* 418 F.2d 1276, 1285 (2d Cir. 1969); *Roginsky v. Richardson-Merrell, Inc.,* 378 F.2d 832 (2nd Cir. 1967).

Finally, if trustees of multiemployer funds are potentially liable for punitive damages for mishandling of benefit claims, the substantial *in terrorem* effect of such exposure will have a deleterious effect on the administration of ERISA-regulated employee benefit plans.[10] Many unmeritorious claims may be paid in full or settled, simply to avoid the exposure to open-ended liability for punitive damages.

3. The Unlimited Nature of Punitive Damage Liability.

The authorities appear to be in universal agreement that the grant of a punitive damage award is a discretionary act of the trier of fact; *see, e.g., Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910 (1978); Prosser, *Torts,*

[10]In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974) this court held that punitive damages could not be awarded against a publisher of a defamatory article because "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship . . ." The award of punitive damages against the trustees of the employee benefit plans will have the same "chilling" effect on their efficient administration of such plans.

(4th ed.) Section 2, pp. 13-14; *Central Microfilm Service v. Basic/Four Corporation,* 688 F.2d 1206 (8th Cir. 1982).[11]

Because of the wide discretion which the trier of fact enjoys in setting an award of punitive damage, there is no practical way accurately to determine, in advance of trial, the extent of a defendant's exposure to such an award.[12]

The Ninth Circuit has attempted to limit the circumstances in which such an award will be available by stating that punitive damages may only be recovered where there is "a showing that the fiduciary, in carrying out its duties and responsibilities under the Act, acted with actual malice or wanton indifference to the rights of a participant or beneficiary." 722 F.2d at 492. But terms such as "wanton indifference" are so nebulous that the trier of fact is given nearly unlimited range in determining whether to award such damages.

[11]The Second Circuit has referred to "huge and perhaps capricious punitive damages which some juries have awarded." *Green v. Wolf Corporation,* 406 F.2d 291, 303 (1968).

[12]As this Court has noted, "In most jurisdictions jury discretion over the amounts awarded [as punitive damages] is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). Commentators have also noted the lack of uniform standards for the award of punitive damages: "The law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms." *Ellis, Fairness and Efficiency in the Law of Punitive Damages,* 56 So.Cal.L.Rev. 1, 52-53 (1982).

Other courts have met with little success in attempting to crystallize the standards to be employed in determining whether punitive damages should be assessed.[13]

Finally, this Court has noted that, in the absence of some compelling purpose, punitive damages are merely a "windfall" to a fully compensated plaintiff; *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). The Court's characterization of punitive damages in *City of Newport* applies with full force to the issue presented by the Petition in this case. Section 502 of ERISA provides ample make-whole remedies to trust fund beneficiaries; any "smart money" they obtain through punitive damage awards is a bonus at the expense of the trust fund, its fiduciaries, and the fund's other beneficiaries.

The absence of clear standards for the award of punitive damages adds a undesirable burden to those already shouldered by trust fiduciaries, with no clear benefit in exchange.

[13]This Court has recently taken note of the diverse range of touchstone phrases used by lower courts to analyze punitive damage claims, and stated that the variation in standards "was exacerbated by the ambiguity and slipperiness of such common terms as 'malice' and 'gross negligence'" *Smith v. Wade*, __ U.S. __, __, 103 S.Ct. 1625, 1631 (1983). *See, e.g., Schwartz v. Sears, Roebuck & Co.*, 669 F.2d 1091 (5th Cir. 1982) [punitive damages justified where there was an "entire want of care which would raise the belief that the act or omission complained of was the result or consequence of indifference to the right or welfare of the person or persons affected by it."]; *Silberg v. California Life Insurance Co.*, 11 Cal.3d 452 (1974) [to be liable for punitive damages, the defendant "must act with the intent to vex, injure or annoy, or with a consequent disregard of the plaintiff's rights"]; *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (1978) [punitive damages available "only where the wrong was inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness or malice."].

IV.

CONCLUSION

For the reasons set forth herein, the decision of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

Dated: November 10, 1984

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No. 84-9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
and CECILIA STEVENSON,
Petitioners,
v.
DORIS RUSSELL,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary of an employee benefit plan may be held liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of benefit claims?

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BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTERESTS OF THE AMICI [1]

The American Council of Life Insurance ("Council") represents the interests of 611 member life insurance companies including most of the major life insurers in the country. The Council's members account for ninety-nine percent of the insured private pension plan business in the United States. The Health Insurance Association of America ("HIAA") represents the interests of 327 member companies which write over eighty-five percent of the health insurance written by health insurance companies in the country, and the combined memberships of the HIAA and the Council represent over ninety percent

[1] Consent from counsel for both parties has been filed with the Clerk of this Court.

of the health insurance written by insurance companies in the United States.

The question of punitive damages awards for mishandling benefit claims poses grave concerns to members of the Council and the HIAA. Many members of the Council and the HIAA voluntarily provide benefits to their employees under plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and they administer plans of other employers which are affected by that Act. Because the opinion below creates the possibility that the processing of a benefit claim may be accompanied by substantial, yet unpredictable, compensatory and punitive awards, the stability of the plans administered by members of the Council and the HIAA is seriously threatened. Members will be forced to bear the increased costs of defending actions seeking punitive relief and of processing unmeritorious claims to avoid such actions in the future. Faced with large and unpredictable punitive awards, members and other employers may be unwilling, or unable, to increase contributions to employee benefit plans, or to establish new plans, due to the increased liabilities associated with such plans.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 722 F.2d 482. The opinion of the United States District Court for the Central District of California is not reported. It is set forth at pp. 26a-30a in the Appendix to the Petition.

JURISDICTION

The judgment below was entered on December 16, 1983. On July 3, 1984, petitioners filed a timely Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit. On October 1, 1984, this Court granted

the Petition. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") provides, in pertinent part, that:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a) (1982).

Section 409(a) of ERISA provides, in relevant part, that:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary,

and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (1982).

STATEMENT

Massachusetts Mutual Life Insurance Company ("Mutual") provides disability benefits to its employees under two plans: the Employee Salary Continuance Plan and the Employee Disability Plan. The Employee Salary Continuance Plan provides short-term salary continuance benefits based upon a percentage of an employee's salary. The Employee Disability Plan provides disability benefits when all benefits under the Employee Salary Continuance Plan are exhausted, and when an employee is disabled for a minimum of eight weeks. Both plans are provided out of company assets and at no cost to Mutual's employees.[2]

The respondent here, an employee of Mutual, took a leave of absence in May, 1979, due to a back ailment. Respondent submitted a claim for disability benefits, and Mutual began paying salary continuance benefits under its Employee Salary Continuance Plan. Payment of these benefits, however, was terminated in October, 1979, after Mutual's Disability Committee received an orthopedic specialist's report which indicated that respondent was not physically disabled.

Respondent took an internal appeal of Mutual's decision to terminate her salary continuance benefits. In a letter dated November 27, 1979, respondent submitted to Mutual's Plan Administrator additional evidence of her disability, including a report from respondent's psy-

[2] The Employee Salary Continuance Plan and the Employee Disability Plan are welfare benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. §§ 1001 *et seq.*

chiatrist indicating that she was suffering from a psychosomatic disability. This letter was treated as a formal appeal and was referred to the Disability Committee. At the request of this Committee, respondent underwent an independent psychiatric examination, after which the examining physician concluded that respondent was indeed temporarily disabled due to psychiatric illness. Based upon this information, Mutual resumed paying salary continuance benefits to the respondent in March, 1980. All accrued salary continuance benefits owed to the respondent were promptly paid by Mutual, and respondent continues to receive long-term disability benefits under Mutual's disability plan.

Respondent initiated this action in a California Superior Court to recover damages which she claims were caused by Mutual's alleged improper handling of her claim for benefits. In her complaint, respondent asserted various state law causes of action, including breach of the covenant of good faith and fair dealing under California law, breach of fiduciary duty, and intentional and negligent infliction of emotional distress. Respondent sought both compensatory and punitive damages. Mutual removed the action to the United States District Court for the Central District of California on grounds that respondent's causes of action "related to" her benefits and were thus preempted by ERISA. *See* 29 U.S.C. § 1144.

The Proceedings Below

After removal to the district court, Mutual moved for summary judgment in its favor as to all claims, and this was granted. On appeal, a panel of the Ninth Circuit agreed with the district court that ERISA preempted the state law causes of action based upon Mutual's alleged mishandling of respondent's disability claims. The court of appeals ruled, however, that sections 502(a)(2) and 409(a) of ERISA afford plan beneficiaries a federal

right to bring an action against plan fiduciaries for breach of their duties based upon an alleged improper handling of benefit claims, and that such beneficiaries are entitled to recover compensatory damages, not limited by the amount of any benefit loss, which are proximately caused by the breach. The court of appeals further held that punitive damages are recoverable under ERISA, saying that section 409 confers broad discretion upon courts in fashioning appropriate relief.

SUMMARY OF ARGUMENT

The relatively simple claim for benefits initiated by the respondent in this case, a claim which was effectively resolved by internal procedures, has mushroomed into a case of wide significance. As it has now developed, this case involves the propriety of extra-contractual relief, and of punitive damages, in actions brought under ERISA.

In concluding that punitive damages are recoverable under ERISA, the Ninth Circuit misconstrued the language of ERISA and reached a result at odds with important policies underlying the Act. The terms of sections 502(a) and 409(a) of ERISA indicate that recovery for breaches of fiduciary obligations inures to the benefit of the plan itself, and not to beneficiaries of the plan. Moreover, the types of relief sought in this case—punitive damages and extra-contractual compensatory damages—are plainly outside the scope of civil remedies accorded to plan beneficiaries by Congress. Nowhere in ERISA's broad enforcement scheme did Congress state or imply that punitive damages, which are neither equitable nor remedial, could be awarded as an additional remedy under ERISA.

The Ninth Circuit's decision is also at odds with the policies underlying the Act. The decision to permit punitive damages awards in ERISA actions effectively undermines the intent of Congress to provide uniformity in the administration of benefit plans. The Ninth Circuit's decision subjects interstate fiduciaries to differing liabilities depending upon the situs of a plan, and breeds uncertainty and inconsistency in the enforcement of ERISA.

Moreover, contrary to Congress' desire to encourage the creation and expansion of employee benefit plans, the Ninth Circuit's decision effectively deters the development of such plans. By adding punitive damages to the array of remedies available to beneficiaries and participants, the decision below adds substantial, but unquantifiable, costs to the administration of benefit plans. The decision forces employers to incur increased costs in processing even the most frivolous of claims, and to incur the risk of punitive damages in litigating these claims.

The injection of punitive damages into the enforcement scheme of ERISA poses significant problems to employers who voluntarily provide benefit plans and who will be forced to defend against numerous actions by disgruntled beneficiaries seeking substantial punitive awards. In the absence of meaningful standards for assessing punitive damages, the prospect that punitive damages will be assessed against fiduciaries in an arbitrary manner, and in excessive amounts, wholly disproportionate to any injuries suffered, becomes quite real. The law of punitive damages in general, and the Ninth Circuit's decision in particular, establish no adequate procedural safeguards to protect against such unfair awards, and this raises serious constitutional questions.

ARGUMENT

I. ERISA SHOULD NOT BE CONSTRUED TO PROVIDE A CAUSE OF ACTION FOR PUNITIVE DAMAGES AND EXTRA-CONTRACTUAL RELIEF

A. The Ninth Circuit's Decision Is Inconsistent with the Language of ERISA

The issue presented in this case is whether the Employee Retirement Income Security Act permits a plan participant or beneficiary to recover punitive damages and extra-contractual relief from a plan fiduciary for an alleged mishandling of a benefit claim. While the lower federal courts are divided on the issue of the availability of punitive damages under ERISA, a substantial number of courts has concluded that such damages are not recoverable.[3]

The court below held to the contrary.[4] In reaching this result, the court essentially legislated a remedy which Congress did not prescribe when it enacted ERISA.

The decision below finds no basis in the language of ERISA.[5] Section 502(a)(2) of ERISA authorizes the Secretary of Labor, participants, beneficiaries and fiduciaries to institute civil actions for "appropriate relief" under section 409—the fiduciary liability provision of ERISA. *See* 29 U.S.C. §§ 1132(a)(2) and 1109. In section 409, Congress expressly articulated the type of relief it deemed to be appropriate for breaches of fiduciary duties. Specifically, section 409(a) provides that a fiduciary who fails to meet its duties under the Act—

> shall be personally liable to make good *to such plan* any losses to the plan resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan . . . , and shall be subject *to such other equitable or remedial relief* as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (emphasis added). In accordance with the plain terms of the statute, therefore, any recovery of appropriate "equitable or remedial relief" under

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[3] *See, e.g., Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 and 1084 (1981) (dictum); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984) (dictum); *Sheahan v. Leahy et al.*, No. 84-1833C(B) (E.D. Mo. August 23, 1984); *Zittrouer v. UARCO Incorporated Group Benefit Plan*, 582 F. Supp. 1471 (N.D. Ga. 1984); *Meyer v. Phillip Morris, Inc.*, 575 F. Supp. 1232 (E.D. Mo. 1983); *Hechenberger v. Western Electric Co.*, 570 F. Supp. 820 (E.D. Mo. 1983); *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745 (N.D. Ga. 1983); *Meyer v. Phillip Morris, Inc.*, 569 F. Supp. 1510 (E.D. Mo. 1983); *Maxfield v. Central States*, 559 F. Supp. 158 (N.D. Ill. 1982); *Diano v. Central States*, 551 F. Supp. 861 (N.D. Ohio 1982); *Hoskins v. Retirement Plan*, No. 78C3670 (N.D. Ill. 1982); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979); and *Hurn v. Retirement Fund Trust*, 424 F. Supp. 80 (C.D. Cal. 1976).

[4] The Ninth Circuit has since reaffirmed its conclusion that ERISA permits awards of punitive damages. *Winterrowd v. David Freedman and Company*, 724 F.2d 823 (9th Cir. 1984). Several federal district courts have similarly concluded that punitive damages are recoverable under various provisions of ERISA. *See Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084 (W.D. Pa. 1983); *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677 (C.D. Cal. 1982); *Free v. Gilbert Hodgman, Inc.*, 3 Empl. Ben. Cas. (BNA) 1010 (N.D. Ill. 1982); *Bobo v. 1950 Pension Plan*, 548 F. Supp. 623 (W.D.N.Y. 1982); *Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980); and *Bittner v. Sadoff & Rudoy Industries*, 490 F. Supp. 534 (E.D. Wis. 1980).

[5] As this Court has said, "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Central Trust Co. v. Official Creditors' Committee*, 454 U.S. 354, 359-60 (1982), *quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

section 409 accrues solely to the benefit of the plan, and not directly to plan beneficiaries.[6]

Contrary to the opinion of the court below, the type of "other equitable or remedial relief" contemplated by section 409 does not encompass an award of punitive damages to a plan participant or beneficiary. The very terms of section 409 remove any doubt as to the type of relief Congress intended to authorize when it enacted ERISA. Punitive damages are not a form of "equitable" relief, but are instead a form of relief developed in the common law.[7] Nor are punitive damages "remedial" in nature.

[6] This conclusion finds support in the legislative history of ERISA. Throughout its deliberations, Congress repeatedly stated that an errant fiduciary would be personally liable "to the plan". *See* H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 320 (1974) (fiduciary is personally liable for any losses to the plan resulting from a breach of its duties); S. Rep. No. 383, 93d Cong., 1st Sess. 105 (1973) (fiduciary must reimburse the plan for any losses resulting from a breach of fiduciary duties and must restore to the plan any profits made with plan assets); S. Rep. No. 127, 93d Cong., 1st Sess. 33 (1973) (fiduciary must reimburse fund for any losses attributable to a breach of its duties).

In contrast to Congress' decision to limit recovery under section 409 to the plan itself, Congress provided several methods for recovery by a participant or beneficiary on his or her own behalf. Specifically, in section 502(a)(1)(B), Congress empowered beneficiaries and participants to sue to recover benefits due under the plan, to enforce their rights under the plan, or to clarify their rights to future benefits. *See* 29 U.S.C. § 1132(a)(1)(B).

[7] *See, e.g., Curtis v. Loether*, 415 U.S. 189, 196 (1974); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982); *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 751 (N.D. Ga. 1983). Congress apparently knew the difference between "legal" and "equitable" remedies when it enacted ERISA. Congress considered, but rejected, an effort to incorporate into ERISA's fiduciary liability provision the option of seeking "legal" relief in addition to equitable relief. As passed by the Senate, H.R. 2 provided that a participant could bring "[c]ivil actions for appropriate relief, legal and equitable, to redress or restrain a breach" of fiduciary duties. *See* H.R. 2, *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. III at 3816 (1976); *see also* S.4, *reprinted in* Legislative History of the Employee Retire-

Punitive damages are designed to *punish* and *deter* reprehensible conduct, not to *remedy* any wrong suffered. In cases involving statutes which, like ERISA, are essentially remedial in nature, this Court has refused to permit awards of punitive damages. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979) (Railway Labor Act); *Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940) (National Labor Relations Act). Accordingly, had Congress desired to include punitive damages within the array of remedies provided in sections 502(a) and 409, it would certainly have employed words other than "equitable" or "remedial" to achieve that result.

That punitive damages are not "equitable or remedial relief" within the meaning of section 409 is further shown by Congress' own articulation of the type of "other" relief which it deemed to be appropriate in actions under that provision. Consistent with the array of non-legal forms of relief provided in sections 502(a) and 409, Congress expressly provided that removal of a fiduciary would be an appropriate form of "other" relief under section 409. *See* 29 U.S.C. § 1109(a). Thus, to conclude that ERISA permits an award of punitive damages for a breach of fiduciary duties—an award which is neither equitable nor remedial and which is inconsistent with the types of non-legal relief specifically provided by Congress—would be to distort the plain words and intent of section 409(a).

B. The Decision Below Is Inconsistent with the Legislative History of ERISA and Undermines Important Policies Embodied in the Act

Nothing in the legislative history of ERISA alters the conclusion that the Act does not provide for awards of

ment Income Security Act of 1974, Vol. I at 579 (1976). As passed by the House, and ultimately adopted by the conferees, H.R. 2 contained no reference to "legal" relief, but provided merely for appropriate "equitable or remedial relief." *Id.*, Vol. III at 3953 and 4345.

punitive damages in actions for breaches of fiduciary obligations. In none of its deliberations did Congress state or imply that punitive damages would be available in civil enforcement actions under ERISA. In fact, the conclusion that punitive damages are available under ERISA is wholly inconsistent with fundamental policies underlying the Act.

Construing section 409 to permit punitive damages to be assessed against a plan fiduciary distorts the intent of Congress to establish a uniform scheme for administering employee benefit plans. If punitive damages are allowed in benefit plan cases, as the court below has held, fiduciaries of plans will be subjected to the capricious and haphazard application of punitive damages, according to the practices of the several states, thus creating diversity where Congress intended to establish uniformity.[8] Congress could not have intended to inject such an element of uncertainty into ERISA's enforcement scheme. In fact, in describing the fiduciary standards imposed by the proposed legislation, Congress stated:

> [A] fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. . . . [I]t is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973).

The decision below strikes at yet another policy firmly embedded in ERISA. Throughout its deliberations, Con-

[8] The lack of standards for and arbitrary application of punitive damages are discussed in more detail in Part III of this brief, *infra* pp. 17-27.

gress carefully weighed the rights of plan beneficiaries against the interests of employers in administering adequate and cost-efficient plans. While endeavoring to provide effective protection to beneficiaries of pension plans, Congress was "constrained to recognize the voluntary nature of private" plans and undertook to weigh "[t]he relative improvements required by this Act . . . against the additional burdens to be placed on the system." H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973). Recognizing that increases in administrative costs would discourage the establishment of private benefit plans, and thus defeat important public policy objectives, Congress carefully sought to minimize the costs to be placed upon employers by ERISA. As Senator Nelson stated during floor debate on the Conference Report:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, . . . Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

102 Cong. Rec. S15,762 (daily ed. Aug. 22, 1974); *see also* 102 Cong. Rec. H1149 (daily ed. Feb. 26, 1974) (remarks of Representative Ullman).[9]

[9] The Legislative history of ERISA provides clear evidence of the intent of Congress to avoid burdening employers with unreasonable costs. *See, e.g.*, 102 Cong. Rec. H1149 (daily ed. Feb. 26, 1974) ("since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer") (remarks of Representative Ullman); 102 Cong. Rec. H1168 (daily ed. Feb. 26, 1974) ("our primary concern was in tightening the existing standards for qualified plans while at the same time continuing to encourage voluntary participation in such plans. As a result, the committee found it necessary to strike a

The decision bel[illegible] unsettles this delicate balance of costs and benefits. By exposing employers who voluntarily establish employee benefit plans to substantial, yet unpredictable, extra-contractual and punitive damages awards, the Ninth Circuit's decision significantly increases the costs Congress carefully sought to minimize when it enacted ERISA. Faced with the increased liabilities associated with employee benefit plans, employers will be discouraged from establishing new plans. Moreover, confronted with the proliferation of substantial and unpredictable punitive damages awards, employers may be unwilling, or unable, to increase contributions to existing benefit plans. The decision below creates the real possibility that funds which an employer might normally channel into an employee benefit plan will instead be expended to meet the increased costs of processing or paying unmeritorious benefit claims and of defending against potentially frivolous suits which threaten largely unpredictable results. By increasing the costs of administering employee benefit plans, and thus discouraging their development, the decision below achieves precisely the result which Congress carefully sought to avoid when it enacted ERISA.

II. THE DECISION BELOW CONTRAVENES THIS COURT'S ADMONITION AGAINST IMPLICATION OF REMEDIES

"It is an elemental canon of statutory construction that where a statute expressly provides a particular

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very delicate balance between what we felt companies with pension plans should do and what they were willing to do, since no employer can be compelled to offer any plan at all") (remarks of Representative Rostenkowski); 102 Cong. Rec. S15,753-754 (daily ed. Aug. 22, 1974) ("We who have worked intimately on this legislation have always kept in mind that private pension plans depend for their very existence on voluntary action. We know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, particularly for employers who generally foot most of the bill") (remarks of Senator Long).

remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979); *see also Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14-15 (1981). Particularly where Congress has established a comprehensive scheme for enforcing a statute, this Court has refused to assume that Congress meant to authorize additional remedies by judicial implication. *See Northwest Airlines, Inc. v. Transport Workers Union of America*, 45[illegible] U.S. 77, 97 (1981).

To protect employee rights and preserve the integrity of employee benefit plans, Congress incorporated into ERISA a comprehensive enforcement scheme. Thus, plan participants and beneficiaries are expressly given several means of redressing violations of the Act, including the right to sue to recover benefits, to enforce or clarify rights under a plan, to enjoin acts or practices which violate the Act, and to redress breaches of fiduciary duties. *See* 29 U.S.C. § 1132(a)(1-3). In addition to these civil remedies, Congress made specific provision to *punish* and *deter* by imposing criminal penalties against persons who willfully violate the provisions of the Act. Specifically, section 501 imposes a fine of up to $5,000 upon individuals, or up to $10,000 upon corporations, who willfully violate the reporting and disclosure provisions of the Act. *See* 29 U.S.C. § 1131. In addition, section 511 provides that any person who willfully interferes with a beneficiary's exercise of rights under the Act will be fined $10,000 or imprisoned for up to one year, or both. *See* 29 U.S.C. § 1141.

Despite the numerous express remedies provided in ERISA, the court below erroneously concluded that Congress intended to afford plan beneficiaries yet another form of relief—extra-contractual and punitive damages. Yet nowhere in its comprehensive enforcement scheme did Congress ever mention punitive and extra-contractual damages. In fact, without suggesting that any broader

relief would be appropriate, Congress provided that a participant or beneficiary could sue "to recover *benefits due to him* under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B) (emphasis added).

Significantly, this Court has hesitated to award punitive damages where Congress has not provided for such awards. In *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), this Court held that punitive damages could not be assessed under the Railway Labor Act against a union for a breach of its duty of fair representation. The cause of action in *Foust* was judicially implied, and, accordingly, Congress had not specified the type of remedial relief available in fair representation suits. In the absence of clear congressional guidance, and in light of the remedial nature of the statute, this Court refused to permit punitive damages to be awarded. It noted that the benefits of increasing a union's willingness to pursue individual complaints due to the threat of punitive damages were offset by the possibility that punitive awards would upset the balance of individual and collective interests and could impair the financial stability of unions.[10]

In enacting ERISA, Congress struck a balance between the rights of employees and the interests of employers, and devised an enforcement scheme which would ensure that the balance is maintained. Congress expressly enumerated the remedies it considered necessary to redress violations of ERISA. The absence of punitive and extra-

[10] Similarly, this and other federal courts have refused to permit punitive damages to be awarded in actions brought under analogous statutes, including certain actions under the National Labor Relations Act, *see Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940) (unfair labor practices); *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235 (5th Cir. 1980) (breach of duty of fair representation); section 303 of the Labor Management Relations Act, *see Local 20, Teamsters v. Morton*, 377 U.S. 252, 260-61 (1964); and Title VII of the Civil Rights Act of 1964, *see, e.g.*, *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982).

contractual damages from these remedies is therefore significant.[11] Had Congress intended to provide for punitive damages in addition to the remedies provided in sections 502(a) and 409, it could readily have done so.[12]

III. THE DECISION BELOW FAILS TO ESTABLISH WORKABLE AND CONSTITUTIONALLY SOUND STANDARDS FOR ASSESSING PUNITIVE DAMAGES

Punitive damages are not "a favorite of the law." *See Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting), and cases there cited. They are an historical anomaly, transplanted in neo-natal state to American soil from eighteenth century England and nurtured by early American courts which employed punitive damages to compensate victims in small amounts for intangible injuries which the law otherwise did not recognize.[13]

[11] Indeed, the United States District Court for the Northern District of Illinois has refused to entertain an action under ERISA for compensatory and punitive damages based upon an allegedly wrongful discharge, stating:

> A comprehensive scheme of remedies is provided by ERISA, which demonstrates Congress' intention to bar additional common law remedies. In light of such congressional intent, this court may not create new remedies that might upset carefully considered legislative programs. *See Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. at 97.

Wilke v. Morton Thiokol, Inc., No. 84 C 1352 (N.D. Ill. June 26, 1984).

[12] Congress clearly knows how to provide for punitive damages where it deems them to be appropriate. *See, e.g.*, Consumer Credit Protection Act § 616, 15 U.S.C. § 1681n (1982) (punitive damages); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520 (1982) (punitive damages); Civil Rights Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1976) (punitive damages); Clayton Act § 4, 15 U.S.C. § 15 (1976) (treble damages).

[13] The doctrine of punitive damages was recognized in 1851 by this Court in a modest way in *Day v. Woodworth*, 13 Howard 363 (1851). In a passage considered to be the foundation of punitive

Punitive damages were thus awarded in small sums to victims of tortious conduct, such as libel or slander, where actual damages for humiliation or affronts to dignity were largely unascertainable. *See* Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 Forum 377, 380-81 (1983).

From this small beginning, punitive damages have recently branched far beyond their origins in insult torts and have been stretched beyond the limits of their validity.[14] With the expansion of compensatory damages to include intangible injuries such as pain and suffering and humiliation, much of the historical justification for punitive damages has disappeared. The anomaly nevertheless persists. Seizing upon the retributive and deterrent functions served by punitive damages, many courts have expanded the shapeless doctrine, resting upon a nebulous base at best, and have awarded punitive damages in cases outside the traditional tort areas and in large and essentially arbitrary amounts bearing no relation to the actual harm suffered.

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damages in American law, Justice Grier, writing for the Court, stated (13 Howard at 371):

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. . . . In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

[14] As has been well said in another context, "these laws are being extrapolated to places where they no longer apply." Bernstein, "Dread Singularities" (Book Review), New York Times Book Review, April 25, 1982, p. 10.

The expansion of this doctrine beyond the traditional tort areas has brought with it an explosive increase in the size and frequency of punitive damages awards in product liability cases. Prior to 1970, apparently only one reported appellate court decision had upheld an award of punitive damages in such a case. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 271 n.6 (1983).[15] Since that time, however, cases in which courts have awarded punitive damages in excess of $1 million have been frequent.[16] And there must have been many hundreds of

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[15] That decision, *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App.2d 689, 60 Cal. Rptr. 398 (1967), involved a jury award of $250,000 for a drug company's failure to conduct proper tests and to provide adequate warnings on a cholesterol-inhibiting drug.

[16] Heralding the proliferation of punitive damages awards in product liability cases, a jury in 1981 made an award of $125 million in punitive damages (which was later remitted to $3.5 million) against Ford Motor Company after a car it had marketed with a fuel system found to be defective exploded in a collision. *See Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 174 Cal. Rptr. 348 (1981). Numerous other cases evidence the seemingly uncontrolled growth in both the size and frequency of punitive damages awards. *See, e.g., Ford Motor Company v. Stubblefield*, No. 67758 (Ga. Ct. App. June 13, 1984) ($8 million dollar punitive damages award upheld); *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) (court reinstated jury award for $5 million in punitive damages), *modified on other grounds*, 670 F.2d 21 (5th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Airco Inc. v. Simmons First National Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982) (court affirmed jury award of $3 million in punitive damages); *Hasson v. Ford Motor Company*, 32 Cal.3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171 (1982) ($4 million award in punitive damages upheld), *petition dismissed*, 459 U.S. 1190 (1983); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980) (jury award of $1 million in punitive damages upheld); *Leichtamer v. American Motors Corp.*, 67 Ohio St.2d 456, 424 N.E.2d 568 (1981) (award of $1.1 million in punitive damages upheld); *Maxey v. Freightliner Corporation*, 450 F. Supp. 955 (N.D. Tex. 1978) (jury award of $10 million in punitive damages overturned), *aff'd*, 623 F.2d 395 (5th Cir. 1980), *vacated and re-*

cases in which punitive damages in smaller amounts have been routinely allowed, resulting in a very large aggregate of such awards. *Cf.* Judge Friendly's opinion in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Staggering sums have also been awarded as punitive damages in mass tort cases[17] as well as in insurance cases. Juries (often in California and Arizona within the area of the Ninth Circuit) have awarded large sums as punitive damages against insurance companies, ranging

manded upon rehearing, 665 F.2d 1367 (5th Cir. 1982), *vacated in part and affirmed in part,* 722 F.2d 1238 (5th Cir. 1984); *Sturm, Ruger & Co. v. Day,* 594 P.2d 38 (Alaska 1979), *cert. denied,* 454 U.S. 894 (1981) (court held jury award of $2,895,000 in punitive damages to be excessive); *Ford Motor Company v. Nowak,* 638 S.W.2d 582 (Tex. Ct. App. 1982) (court affirmed jury award of $4 million in punitive damages).

[17] *See* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control,* 52 Fordham L. Rev. 37 (1983). Perhaps the most revealing examples of the growth of punitive damages in the mass tort area are cases involving the Johns-Manville Corporation, a manufacturer of asbestos products, and the A.H. Robins Company, the manufacturer of the Dalkon Shield. As of this year, over 14,000 cases were reportedly pending against Johns-Manville, with prayers for relief totaling over $50 billion. Over 9,300 of these suits contained prayers for punitive relief. *See Jackson v. Johns-Manville Sales Corporation,* 727 F.2d 506, 524 (5th Cir. 1984) (applying Mississippi law, court disallowed jury award of punitive damages totaling $625,000); *see also Hansen v. Johns-Manville Products Corporation,* 734 F.2d 1036 (5th Cir. 1984) (applying Texas law, court remitted $1 million punitive damages award to $300,000). Similarly, as of 1982, approximately 1600 suits were pending against the A.H. Robins Company, with prayers for punitive damages totaling over $2.35 billion. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U. of Chi. L. Rev. 1, 53 (1982). Some of these claims have recently been translated into multi-million dollar punitive awards. *See, e.g., Worsham v. A.H. Robins Co.,* No. 82-5935 (11th Cir. June 18, 1984) (upholding $1 million award of punitive damages); *Palmer v. A.H. Robins Co.,* 684 P.2d 187 (Colo. 1984) ($6.2 million in punitive damages upheld).

from $1 million in *Garvey v. State Farm and Casualty Co.,* No. 760226 (S.F. Super. Ct. Feb. 18, 1982), and $2 million in *Linthicum v. Nationwide Life Ins. Co.,* No. 446562 (Maricopa Co. Dec. 15, 1982), to $8 million in *Frazier v. Metropolitan Insurance Co.,* No. C233971 (L.A. Super Ct. March 14, 1983) and $10 million in *Trus Joist Corp. v. Safeco Insurance Co.,* No. C366678 (Maricopa Co. March 21, 1983). Although some similar awards have not survived judicial scrutiny,[18] many have, posing serious problems in the insurance industry.[19]

The problems posed by the magnitude of punitive damages awards, and by the frequency with which they are assessed, are especially serious in the conduct of the insurance business, which depends heavily on the ability to make careful and exact computations of risks. These difficulties are greatly exacerbated by the vagueness of

[18] *See San Jose Production Credit Association v. Old Republic Life Insurance Co.,* 723 F.2d 700 (9th Cir. 1984) (court reversed jury award of $500,000 in punitive damages for breach of implied covenant of good faith and fair dealing); *Egan v. Mutual of Omaha,* 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979), *appeal dismissed,* 445 U.S. 912 (1980) (jury award of $5 million in punitive damages against insurer for failure to conduct proper investigation of its insured's claim held to be excessive in that award was 40 times larger than the compensatory damages award and represented two and one-half months of the insurer's net income in 1973 as well as more than seven months of its income in 1974).

[19] *See, e.g., Dempsey v. Auto Owners Insurance Co.,* 717 F.2d 556 (11th Cir. 1983) (in action seeking recovery of fire loss under a policy, for bad faith refusal to pay, and for punitive damages, court held jury award of $3.1 million to be excessive and remanded with directions to require a remittitur to $1.5 million); *Sparks v. Republic National Life Ins. Co.,* 132 Ariz. 529, 647 P.2d 1127, *cert. denied,* 459 U.S. 1070 (1982) ($3 million award of punitive damages for insurer's tortious termination of insurance benefits upheld); *Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978) (court upheld jury award of punitive damages, as reduced to $740,000 by the trial court, for insurer's "bad faith" refusal to settle).

standards for determining when, and in what amounts, punitive damages should be awarded. Despite the unprecedented growth in the size and number of punitive damages awards, there has been no concurrent development or refinement of substantive standards to guide courts in assessing these damages.

Punitive damages have been awarded to punish and deter conduct which ranges from "malice" to some degree of "negligence," and a multitude of necessarily overlapping and somewhat redundant terms have been employed to support awards of punitive damages against a defendant whose conduct lies somewhere in between.[20]

[20] *See Dempsey v. Auto Owners Insurance Company*, 717 F.2d 556, 561 (11th Cir. 1983) (applying Alabama's standard requiring "maliciousness, willfulness, or wanton and reckless disregard for the rights of others," court upheld punitive award as remitted to $1.5 million); *Egan v. Mutual of Omaha Insurance Company*, 24 Cal.3d 809, 157 Cal. Rptr. 482, 598 P.2d 452, 458 (1979) (finding that defendant "acted maliciously, with an intent to oppress, and in conscious disregard of the rights of its insured," but deeming $5 million punitive award to be excessive), *appeal dismissed*, 445 U.S. 912 (1980); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 219 (Colo. 1984) (punitive award upheld where injury "attended by circumstances of fraud" or by a "wanton and reckless disregard" of the rights of the plaintiff); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 526 (5th Cir. 1984) (applying Mississippi's requirement of a showing of "wanton, gross, or intentionally wrongful conduct," court disallowed punitive damages award); *Airco Inc. v. Simmons First National Bank*, 276 Ark. 486, 638 S.W.2d 660, 663 (1982) (defendant's reckless disregard of the consequences held to warrant $3 million punitive award); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 739 (Minn.), *cert. denied*, 449 U.S. 921 (1980) (punitive award of $1 million supported by standard of "willful, wanton and/or malicious disregard of the rights of others"); *Leichtamer v. American Motors Corp.*, 67 Ohio St.2d 456, 424 N.E.2d 568, 579 (1981) (punitive damages may be awarded in cases involving fraud, malice or insult, and intentional, reckless, wanton, willful and gross acts which cause injury may constitute malice); *Maxey v. Freightliner Corporation*, 450 F. Supp. 955, 963 (N.D. Tex. 1978) (punitive damages may be awarded if defendant acts "intentionally or willfully, or with a degree of 'gross negligence' which approximates a fixed purpose to bring about the injury"), *aff'd*, 623 F.2d 395 (5th Cir. 1980), *vacated and remanded upon rehearing*, 665 F.2d 1367 (5th Cir. 1982), *vacated in part and affirmed in part*, 722 F.2d 1238 (5th Cir. 1984); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981) (even though punitive damages were warranted on the basis of defendant's "reckless indifference to rights of others, and conscious action in deliberate disregard of them," jury award was held to be excessive); *Wangen v. Ford Motor Company*, 97 Wis.2d 260, 294 N.W.2d 437, 442 (1980) (punitive damages may be awarded upon a showing of malice, ill-will, or wanton, willful or reckless disregard of plaintiff's rights); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1043 (5th Cir. 1984) (punitive damages awarded on the basis of Texas' "gross negligence" standard); *Campus Sweater & Sports Wear Co. v. M.B. Kahn Construction Co.*, 515 F. Supp. 64, 104 (D.S.C. 1979) (punitive damages upheld on basis of South Carolina's standard of negligence which is "so gross or reckless of consequences as to imply or assume the nature of a wantonness, willfulness or recklessness"), *aff'd without opinion*, 644 F.2d 877 (4th Cir. 1981). *See also* Meyers and Barrus, *Punitive Damages in Product Liability Cases: A Survey*, 51 Ins. Counsel J. 212 (April 1984).

Similarly, the courts which have indicated that punitive damages are recoverable under ERISA have articulated varying standards to support punitive awards, ranging from "outrageous conduct," *see Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084, 1094 (W.D. Pa. 1983), to conduct which is "sufficiently willful, malicious, or outrageous," *see Eaton v. D'Amato*, 581 F. Supp. 743, 748 (D.D.C. 1980), to the Ninth Circuit's standard of "actual malice or wanton indifference," *see Winterrowd v. David Freedman and Company*, 724 F.2d 823, 826 (9th Cir. 1984).

While awards of punitive damages have traditionally been premised upon conduct which is found to be "malicious," "willful" or "wanton," these standards have been perceptibly lowered, permitting courts to award punitive damages against a defendant whose conduct can be characterized, at most, by some heightened degree of negligence.[21] Consequently, there is little uniformity among

[21] *See* note 20, *supra*. Application of these "standards" is necessarily imprecise, given the uncertainty surrounding the definitions of such terms as "malice," *see Smith v. Wade*, 461 U.S. 30, 38-41 and n.6, and given the blurred distinctions between terms like

the broad range of standards used to assess punitive damages, and many of these standards are phrased in such vague and evasive terms that they provide no real guidance to courts and juries. *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 34-37 (1982).[22]

Similarly vague are the standards used for determining the amount of punitive damages to be assessed against

"willful," "wanton," "reckless disregard" and "conscious indifference." *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 34-37 (1982). Moreover, the difficulty of distinguishing between conduct which is "reckless" as opposed to merely "negligent" leads inevitably to inconsistent and imprecise applications of these standards. As stated by one author:

> Unfortunately, the distinction between recklessness and negligence relates to no clear behavioral standards in the real world . . . . It is truly striking how we have devised a system that is not far removed from a lottery for deciding such grave matters —with the draw determined by not only the predilections of the presiding judge, but the emotions of the jury sitting in the case.

Rabin, *Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 Stan. L. Rev. 281, 297 (1978).

[22] In an opinion certifying Montana law to a Federal district court, the Supreme Court of Montana recognized this uncertainty in the area of punitive damages. *See First Bank (N.A.)-Billings v. Transamerica Insurance Co.*, 679 P.2d 1217 (Mont. 1984). In concluding that insurance coverage of punitive damages does not violate Montana's public policy, the court noted that "juries and judges typically award punitives for a broad range of conduct not often described as willful or wanton, but as merely reckless or unjustifiable." *Id.* at 1222. Refusing to preclude such insurance coverage in light of the uncertainty in the area of punitive damages, the court further stated that "fact-finders . . . wrestle with concepts like recklessness and reasonableness, such that defendants may not know that their conduct constituted presumed malice until after trial, and that a defendant in one case may never know the sting of punitive damages while another defendant in a similar case may be faced with financing a sizeable award." *Id. See also Sinclair Oil Corporation v. Columbia Casualty Company*, 682 P.2d 975 (Wyo. 1984).

a defendant. This amount is generally left to the sole discretion of the jury, guided only by certain ill-defined factors relating to the nature of the defendant's misdeed and the wealth of the defendant.[23] The lack of standards and, indeed, of rationality, for assessing punitive damages has prompted members of this Court to comment on the arbitrary and prejudicial nature of punitive damages awards. As Justice Powell stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1973):

> In most jurisdictions jury discretion and the amounts [of punitive damages] awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

See also Smith v. Wade, 461 U.S. 30, 57-65, 92-94 (dissenting opinions of Justices Rehnquist and O'Connor); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51 (1979).

The lack of standards for assessing punitive damages, coupled with the unbridled discretion of judges and juries, raises serious questions as to the constitutionality of these damages as they have now been expanded and extrapolated, and of the procedures for awarding them. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983). The due process clauses of the Fifth and Fourteenth Amendments mandate that procedures in civil cases be rational and fair. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Yet the procedures employed in punitive damages actions fail to comply with the simplest concept of fundamental fairness. No unique procedures have been established to protect a defendant in a punitive damages action from the risk that such damages will be improperly awarded, based upon the whim or caprice of a judge

[23] *See* Restatement (Second) of Torts § 908(2) and comment e (1979).

or jury. This often results in an arbitrary and erroneous deprivation of property, or in the stigma which necessarily attaches to a defendant whose conduct is characterized as "malicious" or "wanton".[24] Even if punitive damages are allowed, additional procedural safeguards, such as an elevated standard of proof, limitations on the amounts of punitive damages and bifurcation of punitive damages trials, could be established. This would be likely to reduce the extent of error and prejudice, but few courts have required such procedures.

In addition, even though punitive damages actions are nominally civil, they exemplify characteristics which are inherently criminal. Contrary to the fundamental view that damages are awarded in civil actions to compensate victims for injuries suffered, punitive damages are essentially penalties assessed against defendants to *punish* certain conduct and to *deter* others from engaging in similar acts. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350; *see also Smith v. Wade*, 461 U.S. 30, 58 (dissenting opinion of Justice Rehnquist). Unlike criminal actions, however, punitive damages actions provide none of the constitutional protections accorded to criminal de-

[24] The interests of fiduciaries in ERISA actions in avoiding these erroneous assessments of substantial punitive awards outweigh the interests of beneficiaries who are made whole when all benefits owed to them are fully paid. In a statement which is especially applicable to this case, Justice Rehnquist stated:

> It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm, and to award a windfall, in the form of punitive damages, to someone who already has been fully compensated. These peculiarities ought to be carefully limited—not expanded to every case where a jury may think a defendant was too careless, particularly where a vaguely defined, elastic standard like "reckless indifference" gives free reign to the biases and prejudices of juries. In short, there are persuasive reasons not to create a new punitive damages remedy unless it is clear that Congress so intended.

Smith v. Wade, 461 U.S. at 87-88.

fendants, including proof beyond a reasonable doubt, protection against double jeopardy, *Brady* rules, and the privilege against self-incrimination. *See Smith v. Wade*, 461 U.S. at 59 (dissenting opinion of Justice Rehnquist).[25]

These constitutional infirmities inhere in the Ninth Circuit's decision below permitting the award of punitive damages against plan fiduciaries for breaches of their duties. The decision below provides no workable standards for determining when, and in what amounts, punitive damages should be awarded in actions under ERISA. The decision below thus invites courts to assess potentially unfair and excessive punitive damages against errant fiduciaries, and creates a substantial risk that punitive damages awards will be altogether inappropriate based upon the circumstances of a particular case. By adopting the position that punitive damages are unavailable in actions under ERISA, this Court can halt the expansion of the unfair, unworkable and, we submit, unconstitutional, punitive damages doctrine into the field of employee benefits.

[25] This difference exists despite the fact that punitive damages defendants are often subjected to "damage" awards greatly in excess of the maximum criminal penalties which can be assessed for similar conduct. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 U. Va. L. Rev. 269, 279 (1983). Indeed, even though the maximum financial criminal penalty available under ERISA for "willful" interference with employee rights is $10,000, *see* 29 U.S.C. § 1141, punitive awards against a fiduciary, based upon the same "willful" standard, have been upheld in amounts significantly greater than the statutory maximum. *See Winterrowd v. David Freedman and Co.*, 724 F.2d 823 (9th Cir. 1984) (upholding $75,000 punitive damages award against defendant on the basis of a standard requiring a showing of "actual malice or wanton indifference to the rights of a participant or beneficiary").

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Brief for the Petitioners, the decision below should be reversed.

Respectfully submitted,

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No. 84-9

In the
Supreme Court of the United States
OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and CECILIA STEVENSON,

Petitioners,

v.

DORIS RUSSELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE MOTION PICTURE HEALTH & WELFARE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act permits an employee benefit plan participant or beneficiary to recover punitive damages or extra-contractual compensatory relief from a plan fiduciary for improper or untimely processing of benefit claims?

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BRIEF OF AMICUS CURIAE MOTION PICTURE HEALTH & WELFARE FUND IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Motion Picture Health and Welfare Fund ("Fund") is a multi-employer, multi-union health and welfare fund created pursuant to collective bargaining agreements in the motion picture industry in Los Angeles, California.

The Fund was created pursuant to Section 302 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186, and is administered by a Board of Trustees consisting of an equal number of management and union trustees. The management and union trustees serve on a voluntary basis and receive no compensation for their services.[1] The Fund provides health and welfare benefits to more than 25,000 active and retired employees in the motion picture industry and to the dependents of said employees.

For many years, the Fund provided all benefits to its participants and beneficiaries through the purchase of insurance policies. While the Fund maintained a full complement of employees for claims processing, the final decisions in disputed benefit claims cases were left to the insurance company which issued the policy in question. The utilization of insurance companies to administer the Fund's plan of benefits provided some insulation to the Fund and its Trustees from actions by participants and beneficiaries claiming extra-contractual and punitive damages in cases involving the denial of benefits. Such actions were typically brought against the insurance carrier administering the relevant portion of the plan, and the time and expense involved in defending against such claims were the responsibility of the carrier.

This method of providing benefits, however, proved unduly expensive in light of the Fund's size and ability to self-fund the benefits. Accordingly, effective July 1, 1983, the Trustees of the Fund decided to pay most of the

[1] Seventeen of the eighteen trustees are full-time paid employees of employers, associations of employers and employee organizations whose employees and members are participants in the Fund. Accordingly, they would be prohibited by ERISA from receiving compensation from the Fund even if the Fund's plan document otherwise provided for compensation. 29 U.S.C. §1108(c) (2).

medical benefits provided under the Fund's plan of benefits itself and to administer benefit claims internally. The self-funding of benefits results in very substantial savings to the Fund and inures to the benefit of all participants by bolstering the Fund's financial stability. If the Ninth Circuit's opinion below is permitted to stand, however, the Trustees will be forced to reconsider the prudence of self-funding in light of the significant risks that would be faced by the Fund and its fiduciaries.

Pursuant to Section 503 of ERISA, 29 U.S.C. §1133, the Fund has created a Claims Review Committee vested with final authority to decide whether or not benefits are payable for a disputed claim. Four members of the Board of Trustees serve as the Committee, without pay. Under the Ninth Circuit's opinion, these committee members can expect to be named individually in suits for extra-contractual and punitive damages in any action in which a participant or beneficiary contests a denial of benefits, since such damages would not be available from the plan itself.

Many responsible labor and management officials will decline to serve as fiduciaries for the Fund and other self-funded benefit plans if, by serving, they subject themselves to the risk and expense of defending against such actions. Those officials who do agree to serve will inevitably consider the potential for individual liability as a factor in their benefit decisions, thereby increasing the likelihood that unmeritorious claims will be paid. In either event, the Ninth Circuit's decision operates to the detriment of the participants in the plan as a whole.

The foregoing problems created by the Ninth Circuit's opinion are real, not hypothetical. Within two months of becoming self-funded, the Fund was sued by a participant claiming that the Fund wrongfully denied him benefits.

This action is presently pending in the United States District Court for the Central District of California and involves a claim for approximately $17,000 in benefits. While the benefit claim is relatively small, the plaintiff seeks unspecified damages for pain and suffering, as well as punitive damages, thereby subjecting the Fund and its fiduciaries to substantial potential liability. *Wilson v. Motion Picture Health and Welfare Fund, et al.*, Case No. CV 83-8516 RMT(Kx). It is respectfully submitted that unless the decision below is reversed, such lawsuits against the Fund and other employee benefit plans will multiply as disgruntled participants and their attorneys anticipate the prospect of obtaining substantial damage awards and extracting large sums in settlement.

Petitioners and Respondent have consented to the filing of this brief, and their respective letters of consent have been filed with the Court.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983). In that decision, the Ninth Circuit held that punitive and compensatory damages may be awarded to a participant or beneficiary of an employee benefit plan against a plan fiduciary under Section 409 of ERISA, 29 U.S.C. §1109. The Ninth Circuit concluded that the phrase "other equitable or remedial relief as the court may deem appropriate" in Section 409 authorized awarding such relief. The Ninth Circuit reasoned, *inter alia,* that if such damages were not available, fiduciaries would have no incentive to act responsibly in making decisions on benefit claims.

The order of the United States District Court for the Central District of California granting Petitioners' motion for summary judgment, as well as the findings of fact and conclusions of law issued in connection therewith, are

unreported and appear in the Appendix submitted by the parties to this case at 26a through 32a.

SUMMARY OF ARGUMENT

Amicus curiae joins with Petitioners in seeking reversal of the decision below that a participant or beneficiary may recover extra-contractual and punitive damages under the Employee Retirement Income Security Act ("ERISA") from an individual fiduciary of an employee benefit plan. The Ninth Circuit's holding ignores the comprehensive scheme of remedies provided by ERISA and is contrary to the plain language of Section 409. By its terms, Section 409's remedies may only inure to the benefit of the plan itself. The Ninth Circuit's construction of Section 409 as permitting the award of damages directly to participants and beneficiaries is based upon isolated language taken out of context. When the statute is read as a whole, it is apparent that the Ninth Circuit's reading of the statute is erroneous and that the only remedies available to participants or beneficiaries in the benefit claims context are those set forth in Sections 502(a)(1)(B) and 502(a)(3), which do not include the recovery of extra-contractual or punitive damages.

The legislative history of ERISA also fails to support the Ninth Circuit's conclusion. The one citation to legislative history made by the Ninth Circuit did not refer to Section 409, but to another section of ERISA that provided a much broader range of remedies. Moreover, the reference was to earlier versions of ERISA that had different remedial provisions. Further, the legislative history indicates that Congress intended any relief available under Section 409 to go only to the plan. In short, the legislative history of ERISA is in accord with the clear language of the statute and compels the conclusion that extra-contractual and

punitive damages are not available to a participant or beneficiary in a benefit claims action.

Moreover, significant policy reasons require the reversal of the Ninth Circuit's decision. By holding fiduciaries personally liable for extra-contractual damages resulting from a denial of a claim for benefits, the Ninth Circuit placed the risk of administering a benefit plan on the fiduciaries themselves. Because such damages are not recoverable against a plan, a claim for extra-contractual damages against the fiduciaries will inevitably be added whenever a claim for wrongful denial of benefits is brought against the plan. Few persons will agree to act as fiduciaries if they are subject to personal liability for erroneous decisions. Further, those who do agree to act as fiduciaries will be encouraged to award benefits in all questionable cases. Accordingly, the Ninth Circuit's decision would unnecessarily increase the cost of operating employee benefit plans, and is thereby contrary to the intent of ERISA.

ARGUMENT

A. THE PLAIN LANGUAGE AND DETAILED SCHEME OF ERISA DEMONSTRATE THAT EXTRA-CONTRACTUAL DAMAGES CANNOT BE AWARDED TO A PARTICPANT OR BENEFICIARY IN THE BENEFIT CLAIM CONTEXT.[2]

This Court has long recognized that when Congress has enacted a comprehensive statute containing a detailed remedial scheme, the courts should be loathe to "expand the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974). As this Court stated in *Northwest Airlines, Inc. v. Transport Workers Union:*

> The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.

451 U.S. 77, 97 (1981).

In the decision below, the Ninth Circuit failed to heed this advice. Rather, the Ninth Circuit attempted to manufacture statutory authority for awarding extra-contractual and punitive damage remedies to participants and beneficiaries by reading in isolation the clause

[2]Since the briefs of Petitioners and other *amici* focus on the unavailability of punitive damages under ERISA, this brief will concentrate on the issue of whether a participant or beneficiary may recover extra-contractual damages, such as damages for pain and suffering, in a suit against a fiduciary brought pursuant to Sections 409 and 502(a) (2) of ERISA, 29 U.S.C. § §1109, 1132(a) (2).

contained in Section 409 of ERISA that provides for the award of "other equitable or remedial relief as the court may deem appropriate." *See Russell,* 722 F.2d at 490. As shown below, the Ninth Circuit's conclusion neither comports with ERISA's detailed remedial scheme nor properly interprets the statutory language in issue. An examination of those remedial provisions demonstrates that Section 409, and the phrase permitting "equitable or remedial relief," provide remedies only to the plan itself, not to individual participants and beneficiaries contesting a benefit claim decision.

The civil enforcement provisions of ERISA are contained in Section 502, 29 U.S.C. §1132, and include both individual actions available to participants and beneficiaries and general enforcement actions which may be brought on behalf of the plan by the Secretary of Labor or by a participant, beneficiary, or fiduciary acting in a representative capacity. *Compare* Section 502(a) (1) (A) and (B) and (a) (3) with Section 502(a) (2), (4), (5) and (6). Among the actions available to a participant or beneficiary for individual relief under Section 502 is one for wrongful denial of benefits. The remedies available to a participant or beneficiary in such a benefit claim action are set forth in Section 502(a) (1) (B), which provides that an action may be brought:

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

29 U.S.C. §1132(a) (1) (B). As this section makes clear, Congress has specifically limited the monetary remedy available to a participant or beneficiary to the recovery of the amount of benefits due. *Bittner v. Sadoff & Rudoy Industries,* 728 F.2d 820, 825 (7th Cir. 1984) (money damages beyond the amount of benefits due are not available in an action under Section 502(a) (1) (B)).

However, Congress did not leave participants and beneficiaries without redress in the event of wrongdoing on the part of a plan or its fiduciaries. Section 502(a) (3) specifically permits a participant, beneficiary or fiduciary to bring an action for equitable relief:

> (A) To *enjoin* any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate *equitable* relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

29 U.S.C. §1132(a) (3) (emphasis added). As the court noted in *Stamps v. Michigan Teamsters Joint Council No. 43,* "[s]ubsection (a) (3) clearly and specifically creates a civil action for *equitable* relief." 431 F.Supp. 745, 747 (C.D. Mich. 1977) (emphasis added).

In sum, Congress specifically dealt with the question of the remedies available to a participant or beneficiary claiming a wrongful denial of benefits or a violation of the provisions of ERISA or of the plan, and limited them to the recovery of benefits due and other equitable relief. It is well established, of course, that equitable relief does not include compensatory damages for pain and suffering or other traditional legal relief. D. Dobbs, *Handbook of the Law of Remedies,* §1.1 at 1-3 (1973).[3]

Unlike sections 502(a) (1) (B) and (a) (3), the other subsections of Section 502 are general enforcement

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[3]As Petitioners make clear in their brief, punitive damages are also a legal rather than an equitable remedy and therefore are not available to a participant or beneficiary in a benefit claim action. *See Curtis v. Loether,* 415 U.S. 189, 196 (1974); *Walker v. Ford Motor Co.,* 684 F.2d 1355, 1364 (11th Cir. 1982); *Richerson v. Jones,* 551 F.2d 918, 927 (3d Cir. 1977); *Pearson v. Western Electric Co.,* 542 F.2d 1150, 1152 (10th Cir. 1976).

provisions designed to protect the plan itself. In particular, Section 502(a) (2) permits the *Secretary of Labor,* a participant, beneficiary, or fiduciary to bring an action "for appropriate relief under Section 1109 [Section 409] of this title . . . ." 29 U.S.C. §1132(a)(2). The inclusion of the Secretary of Labor in the class of persons entitled to bring such actions demonstrates Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole.

The language of Section 409 eliminates any doubt that any remedies awarded should inure to the plan itself, not to individual fiduciaries. Section 409 provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good *to such plan* any losses to the plan resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. §1109 (emphasis added).

It is a basic tenet of statutory construction that words are "known by the company [they] keep." *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307 (1961). By considering and quoting the phrase "other equitable and remedial relief" out of context, the Ninth Circuit greatly expanded its meaning. *See Russell,* 722 F.2d at 488, 490. Read in context, the phrase "other equitable or remedial relief" plainly refers to other forms of relief available to the plan. The phrase appears within the same sentence as

and directly after a listing of two types of relief available to the plan. The word "other" was obviously intended to present an alternative to the types of relief available; it cannot be construed as creating an entirely new class of persons to whom the relief may be awarded.[4] *Zink v. Heiser,* 109 Misc.2d 354, 438 N.Y.S.2d 209, 215 (1981) (recovery against fiduciary under Section 409 available only to the plan and not to participants or beneficiaries).

This result is supported by the well-established doctrine of statutory construction *ejusdem generis.* Under this doctrine, where general words follow specific words, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." C. Sands, 2A *Sutherland Statutes and Statutory Construction* §4717, at 103 (4th ed. 1973). *See also Federal Maritime Commission v. Seatrain Lines, Inc.,* 411 U.S. 726, 734 (1973); *U.S. v. Jones,* 131 U.S. 1, 19 (1889) ("It is one of these general expressions which must be restrained by the more special and definite indications of intention furnished by the context.") In Section 409, the relief described in the general phrase "other equitable and remedial relief" must be construed to be of the same nature as the relief

[4]Thus, a court may grant other forms of relief normally available in the enforcement of trusts, such as imposing constructive trusts, requiring an accounting, enjoining specific activity, or ordering specific performance. *See* G. Bogert, *The Law of Trusts and Trustees* §861, at 2-27 (2d ed. rev. 1982). For examples of cases in which the courts have granted "other equitable or remedial relief" under Section 409, *see Davidson v. Cook,* 567 F.Supp. 225, 240 (E.D. Va.1983), *aff'd,* 734 F.2d 10 (4th Cir.), *cert. denied sub nom. Accardi v. Davidson,* 53 U.S.L.W. 3270 (1984) (fiduciaries personally liable to plan for diminished value of investment); *Gilliam v. Edwards,* 492 F.Supp.1255 (D.N.J. 1980) (fiduciary obligated to rescind self-dealing employment agreement and to repay fund for compensation paid pursuant to agreement); *Marshall v. Kelly,* 465 F. Supp. 341, 354 (W.D. Okla. 1978) (court orders rescission of unlawful transactions and appoints interim trustees).

previously specified in the section — relief to the plan. Indeed, the example given, removal of a fiduciary, is precisely the type of remedy sought for the benefit of the plan as a whole.

In short, when Section 409 is read as a whole and is considered in the context of the entire scheme of remedial relief established by ERISA, it is clear that it was not intended to provide a remedy to a disappointed participant or beneficiary of a plan in a case involving a claim for benefits. To the contrary, Section 409 was designed to protect the plan itself from breaches of duty by its fiduciaries and Section 502(a) (2) merely permits participants and beneficiaries to initiate actions for relief under Section 409 on behalf of the plan.

B. THE NINTH CIRCUIT'S DECISION IS NOT SUPPORTED BY THE LEGISLATIVE HISTORY OF ERISA.

The Ninth Circuit's selective reading of the statute is rivaled only by its cavalier use of inapplicable portions of ERISA's legislative history to support its erroneous conclusion. To justify its assertion that Section 409 contemplates awards of extra-contractual and punitive damages, the Ninth Circuit relied heavily upon language in early Senate and House Committee reports that Congress intended ERISA to provide "the full range of legal and equitable remedies available in both state and federal courts." *Russell,* 722 F.2d at 490, 491, *quoting* H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 17 and S.R. Rep. No. 93-127, 93d Cong., 1st Sess. 35, reprinted in *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) (hereinafter *"Legis. Hist."*) 621, 2364. *See also International Union, United Automobile Workers v. Federal Forge, Inc.,* 583

F.Supp. 1350, 1356-57 (W.D. Mich. 1984); *Eaton v. D'Amato,* 581 F.Supp. 743, 747, (D.D.C. 1980).

This quote, however, does not reflect Congress' intentions with regard to the interpretation of Section 409. Indeed, it does not even relate to Section 409. In both the Senate and House reports, the quoted language is found in a section describing the enforcement provisions of the bills. *Legis. Hist.* at 621, 2364. In the bills under consideration by the Senate and House at that time, it was the predecessors of Section 502 that were contained in the enforcement sections of the bills. *Legis. Hist.* at 577, 579, 2331, 2334. In contrast, the predecessors of Section 409 were contained in sections of the bills entitled "Disclosure and Fiduciary Standards" and "Fiduciary Responsibility and Disclosure," respectively. *Legis. Hist.* at 540, 2259. Thus, the language relied upon by the Ninth Circuit below refers to the breadth of remedies provided by Section 502 of ERISA, not to the limited remedy contained in Section 409.[5]

More importantly, the language quoted by the Ninth Circuit sheds no light on ERISA as finally enacted. The quoted language appeared in early Senate and House reports, which were published before debates, before the bills went before a Senate-House Conference Committee, and before the remedy provisions of the Act were finalized. Indeed, the sections providing remedies for breach of fiduciary duty in the Senate version of the bill at the time of the report called for considerably greater relief than is presently provided in ERISA. The Senate version of

[5]The many types of relief encompassed in Section 502 include statutory penalties, §502(a) (1) (A), 29 U.S.C. §1132(a) (1) (A), suits for benefits due, §502(a) (1) (B), 29 U.S.C. §1132(a) (1) (B), declaratory relief, §502(a) (1) (B), 29 U.S.C. §1132(a) (1) (B), equitable relief, §502(a)(3) and (4), 29 U.S.C. §1132 (a)(3), (4), as well as civil penalties, §502(a) (5), 29 U.S.C. §1132(a) (5).

Section 502 specified that beneficiaries and participants could bring "[c]ivil actions for appropriate relief, *legal or equitable*, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary, including but not limited to, the removal of a fiduciary. . . ." H.R. 4200, *Legis. Hist.* at 2099 (emphasis added). The elimination of this reference to legal relief in the final bill indicates that Congress did not intend to permit the recovery of compensatory or punitive damages.

Moreover, nothing in the quoted phrase indicates an intent that any relief available under Section 409 should be awarded to participants or beneficiaries rather than the plan. To the contrary, the legislative history is consistent with the language of the statute and confirms Congress' intent that the remedies available under Section 409 inure to the plan, not to individuals. S. Rep. No. 93-127, 93d Cong, 1st Sess. 33, *Legis. Hist.* at 619 ("a fiduciary is made personally liable for his breach of any responsibility, duty, or obligation owed to the fund, and must reimburse the fund for any loss resulting from such a breach"); "Private Pension Reform Legislation, 93d Congress, March, 1974 — Comparison of Senate-passed and House-passed versions of H.R. 2," prepared by Congressional Research Service of Library of Congress, *Legis. Hist.* at 4265 (both House and Senate versions provide that a fiduciary is personally liable to the fund for any losses resulting from a breach of fiduciary obligations). Accordingly, even if the legislative history cited by the Ninth Circuit were applicable to Section 409, it would not detract from the inevitable conclusion that Section 409 provides relief only to the plan.

C. PUBLIC POLICY MILITATES AGAINST ALLOWING BENEFICIARIES AND PARTICIPANTS TO OBTAIN EXTRA-CONTRACTUAL DAMAGES FROM FIDUCIARIES.

While the plain language of the statute and its legislative history amply demonstrate that the decision below should be reversed, this conclusion is buttressed by important public policy reasons relating to the administration of employee benefit plans. If the Ninth Circuit's decision were permitted to stand, it would inevitably lead to increased litigation in the federal courts, a reluctance by responsible individuals to serve as plan fiduciaries, and an inequitable shifting of the costs of operating benefit plans from the plan and its sponsors to the shoulders of individual fiduciaries.

As previously noted, the touchstone of the Ninth Circuit's decision is its holding that the authority to award compensatory and punitive damages emanates from the language of Section 409. Section 409, however, only provides a remedy against individual fiduciaries and is inapplicable to actions against the plan itself. *Russell*, 722 F.2d at 490 n. 8. Accordingly, under the Ninth Circuit's decision, a participant or beneficiary seeking an award of compensatory damages for pain and suffering must sue the individual fiduciaries responsible for the benefit decision, rather than the plan. In light of the nebulous proof requirements and high recoveries associated with claims for pain and suffering, it is inevitable that any individual filing a claim against a plan alleging wrongful denial of benefits will also assert a claim against the plan's fiduciaries for compensatory damages.[6] Indeed, it would be

[6] This would also lead to the anomalous result that all benefit claim actions would be brought in federal court despite the fact that Congress specifically provided for concurrent state court jurisdiction over actions brought under Section 502(a) (1) (B). 29 U.S.C.

tantamount to malpractice for an attorney to fail to advise his client to bring such a double-barrelled action.

In short, since extra-contractual damages would be available only against fiduciaries and not the plan, adoption of the Ninth Circuit's interpretation of ERISA would imply that Congress intended to shift a major portion of the risk of operating benefit plans to fiduciaries. The impact of such risk shifting would be particularly troublesome in light of the court's further holding that a breach of fiduciary duty, and thus a right to compensatory damages, can be established by a showing of mere negligence — the failure to exercise "reasonable care." 722 F.2d at 489 & n. 7. In the benefit claims context where the issue is often a close question of whether benefits should be awarded under a specific set of facts, fiduciaries could find themselves facing potential personal liability whenever they make a good faith but erroneous decision to deny benefits.

Significantly, it is primarily uncompensated individuals who would be affected by the opinion below. In the majority of self-insured employee benefit plans, the plan sponsors appoint their own full-time employees to serve as fiduciaries. Such individuals are prohibited from receiving compensation for the performance of fiduciary duties. 29 U.S.C. §1108(c)(2). On the other hand, the Ninth Circuit's decision would have no effect on insurance companies acting as fiduciaries under insured welfare benefit plans, since several courts have held that such carriers remain subject to state law actions for compensatory and punitive damages because ERISA does not

§1132(e) (1). The federal courts have *exclusive* jurisdiction over actions alleging a breach of fiduciary duty under Section 502(a) (2) and, therefore, provide the only appropriate forum when the two claims are joined in a single action.

preempt state laws regulating insurance. 29 U.S.C. §1144(b)(2)(A); *see, e.g., Eversole v. Metropolitan Life Insurance Co.*, 500 F.Supp. 1162, 1170 (C.D. Cal. 1980); *McLaughlin v. Connecticut General Life Insurance Co.*, 565 F.Supp. 434, 443-44 (N.D. Cal. 1983).

Moreover, a plan cannot effectively insure such uncompensated fiduciaries against losses arising out of a breach of fiduciary duty. 29 U.S.C. §1110. The Ninth Circuit points out in *Russell* that while liability under Section 409 is against the individual fiduciary personally, 29 U.S.C. §1110 allows for "certain forms of fiduciary indemnification." 722 F.2d at 490 n. 8. The Ninth Circuit's decision fails to consider, however, that while 29 U.S.C. §1110 permits a plan to purchase insurance for its fiduciaries to cover liability or losses occurring by reason of the act or omissions of the fiduciary, the insurance policy must permit recourse by the insurer against the fiduciary in the case of a breach of fiduciary obligations. 29 U.S.C. §1110. Since compensatory damages under Section 409 would be predicated upon a finding of breach of fiduciary duty, the exception would necessarily swallow the rule in this situation.[7]

In these circumstances, holding individual fiduciaries liable under ERISA for extra-contractual and punitive damages in the benefit claims context can only have the undesirable result of deterring qualified individuals from volunteering to serve as fiduciaries. Few people would agree to be placed in a position in which they were regularly required to make decisions as to the propriety of benefit claims if they risked personal liability for each

[7]While the fiduciaries or their employers may purchase insurance without such a recourse provision, they must bear the costs of the insurance and, thus, the costs of operating the plan are still shifted away from the plan itself. Moreover, as discussed in Petitioners' brief, in many states no insurance is available for punitive damages.

erroneous decision. For the same reasons, it can be expected that those individuals who do choose to serve as fiduciaries will be extremely timid in the administration of claims and will opt to award benefits whenever there is any question as to a claim's validity. It is respectfully submitted that Congress never intended such a result.[8]

The Court below suggests that if compensatory and punitive damages could not be recovered against fiduciaries, fiduciaries would have no incentive to abide by the terms of the plan or of ERISA. *Russell*, 722 F.2d at 490. The simple answer to this contention is that Congress did not provide for such relief and it is not for the courts to engraft additional remedies onto the detailed statutory scheme. In any event, Congress did provide ample procedures to correct any fiduciary misconduct. Participants and beneficiaries may always maintain actions to recover benefits wrongfully denied, 29 U.S.C. §1132(a)(1)(B), and may recover attorneys' fees in appropriate cases, 29 U.S.C. §1132(g)(1). Participants and beneficiaries may also seek equitable relief to enjoin violations of the plan's terms, 29 U.S.C. §1132(a)(3), and may seek removal of the fiduciary for improper conduct, 29 U.S.C. §1109. In sum, Congress has provided sufficient means of relief to ensure that participants and beneficiaries have a method of controlling the fiduciary's conduct.

[8]It could be argued, of course, that a plan can avoid these problems by simply reverting to purchasing insurance and delegating the fiduciary duty of deciding benefit claims to an insurance company. As *amicus curiae's* experience shows, however, it can be substantially more expensive to provide benefits through an insured plan than to self-insure, and such a result may therefore needlessly increase the cost of administering welfare benefit plans. See pp. 2-3, *supra*. In addition, Congress clearly intended employee welfare benefit plans to have the choice between self-insuring and purchasing insurance. *See e.g.*, 29 U.S.C. §1023(e); 29 U.S.C. §1101(b) (2); 29 U.S.C. §1112(a) (2) (B); 29 U.S.C. §1144 (b) (2) (B).

Moreover, the decision below primarily affects those fiduciaries who do not act in that role for personal profit and who, therefore, have nothing to gain by wrongfully withholding benefits. As previously noted, profit-oriented fiduciaries are already subject to the precise sanctions that the Ninth Circuit's holding would add to ERISA. See pp.16-17, *supra*. Accordingly, the Ninth Circuit's decision would only add a deterrent where none is necessary.

In conclusion, it is apparent that adopting the interpretation of the Court below would only hamper the efficient operation of employee benefit plans without any concomitant benefit to the participants and beneficiaries.

D. SECTIONS 409 AND 502(a)(2) OF ERISA DO NOT PROVIDE FOR THE RECOVERY OF PUNITIVE DAMAGES BY A PARTICIPANT OR BENEFICIARY FROM A FIDUCIARY.

For each of the reasons set forth above, it is clear that Congress did not intend fiduciaries to be held personally liable for punitive damages under Section 409. Moreover, the possibility of incurring punitive damage liability will further discourage competent persons from serving as fiduciaries.

Amicus curiae adopts the arguments encompassed in Petitioners' brief and joins Petitioners in urging that the portion of the decision below permitting the imposition of punitive damages be reversed as well.

CONCLUSION

For the reasons and on the authorities set forth above, and for the reasons expressed in Petitioners' Brief on the merits, *amicus curiae* respectfully requests that the decision below on the issue of extra-contractual and punitive damages be reversed.

Dated: November 14, 1984

Respectfully submitted,

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PROOF OF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 13, 1984, I served the within *Brief of Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 13, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

No. 84-9 (10)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS FOR ALASKA FISHERMEN'S UNION-SALMON CANNERS PENSION TRUST, ALASKA FISHERMEN'S UNION-SALMON CANNERS WELFARE TRUST, ALASKA PLUMBING & PIPEFITTING INDUSTRY PENSION TRUST FUND, MONTANA TEAMSTER EMPLOYERS TRUST, NATIONAL SHOPMEN PENSION FUND, NORTHWEST METAL CRAFTS TRUST FUND, OREGON TEAMSTER EMPLOYERS TRUST, PRINTING SPECIALTIES AND PAPER PRODUCTS JOINT EMPLOYER AND UNION HEALTH AND WELFARE FUND, RETAIL CLERKS PENSION TRUST, RETAIL CLERKS WELFARE TRUST, SOUTHERN CALIFORNIA LUMBER INDUSTRY HEALTH AND WELFARE FUND, SOUTHERN CALIFORNIA LUMBER INDUSTRY RETIREMENT FUND, AND SPOKANE AREA HOTEL AND RESTAURANT EMPLOYEES TRUST FUND

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary of an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive or compensatory damages for improper or untimely processing of benefit claims?

PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company*

Cecilia Stevenson

Doris Russell

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* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

MML Blend Investment Company, Inc.
MML Equity Investment Company, Inc.
MML Managed Bond Investment Company, Inc.
MML Money Market Investment Company, Inc.
MML Bay State Life Insurance Company
MassMutual Corporate Investors, Inc.
MassMutual Income Investors, Inc.
MassMutual Mortgage and Realty Investors
MassMutual Liquid Assets Trust
Maslif One & Co.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-9

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY
and CECILIA STEVENSON,
Petitioners,
v.
DORIS RUSSELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS FOR ALASKA FISHERMEN'S UNION-SALMON CANNERS PENSION TRUST, ALASKA FISHERMEN'S UNION-SALMON CANNERS WELFARE TRUST, ALASKA PLUMBING & PIPEFITTING INDUSTRY PENSION TRUST FUND, MONTANA TEAMSTER EMPLOYERS TRUST, NATIONAL SHOPMEN PENSION FUND, NORTHWEST METAL CRAFTS TRUST FUND, OREGON TEAMSTER EMPLOYERS TRUST, PRINTING SPECIALTIES AND PAPER PRODUCTS JOINT EMPLOYER AND UNION HEALTH AND WELFARE FUND, RETAIL CLERKS PENSION TRUST, RETAIL CLERKS WELFARE TRUST, SOUTHERN CALIFORNIA LUMBER INDUSTRY HEALTH AND WELFARE FUND, SOUTHERN CALIFORNIA LUMBER INDUSTRY RETIREMENT FUND, AND SPOKANE AREA HOTEL AND RESTAURANT EMPLOYEES TRUST FUND

The amici curiae Alaska Fishermen's Union-Salmon Canners Pension Trust, Alaska Fishermen's Union-Salmon Canners Welfare Trust, Alaska Plumbing & Pipefitting Industry Pension Trust Fund, Montana Teamster Employers Trust, National Shopmen Pension Fund, Northwest Metal Crafts Trust Fund, Oregon Teamster Employers Trust, Printing Specialties and Paper Products Joint Employer and Union Health and Welfare Fund, Retail Clerks Pension Trust, Retail Clerks Welfare Trust, Southern California Lumber Industry Health and Welfare Fund, Southern California Lumber Industry Retirement Fund, and Spokane Area Hotel and Restaurant Employees Trust Fund, respectfully submit this brief in support of the petitioners in the above-captioned case, pursuant to Rule 36.3 of the Supreme Court rules. The amici curiae have obtained the consent of counsel for both the petitioner and the respondent.

The amici curiae have an interest in this action because they are multiemployer pension and health and welfare plans organized under the authority of the Taft-Hartley Act and the Employee Retirement Income Security Act (ERISA).

The Alaska Fishemen's Union-Salmon Canners Pension Trust is a pension plan with 1,191 participants and 13 contributing employers. It received 40 claims during its last reporting year. The Alaska Fishermen's Union-Salmon Canners Welfare Trust is a health and welfare plan with 1,122 participants and 13 contributing employers. It received 893 claims during its last reporting year. The Alaska Plumbing & Pipefitting Industry Pension Trust Fund is a pension plan with 1,357 participants and 200 contributing employers. It received 49 claims during its last reporting year. The Montana Teamster Employers Trust is a health and welfare plan with 1,904 participants and 179 contributing employers. It received 28,600 claims during its last reporting year. The National Shopmen Pension Fund is a pension plan with

17,000 participants and 283 contributing employers. It received 480 claims during its last reporting year. The Northwest Metal Crafts Trust Fund is a health and welfare plan with 5,695 participants and 139 contributing employers. It received 20,000 claims during its last reporting year. The Oregon Teamster Employers Trust is a health and welfare plan with 17,600 participants and 993 contributing employers. It received 58,200 claims during its last reporting year. The Printing Specialties and Paper Products Joint Employer and Union Health and Welfare Fund is a health and welfare plan with 8,400 participants and 126 contributing employers. It received 102,000 claims during its last reporting year. The Retail Clerks Pension Trust is a pension plan with 25,153 participants and 738 contributing employers. It received 258 claims during its last reporting year. The Retail Clerks Welfare Trust is a welfare plan with 17,100 participants and 667 contributing employers. It received 222,672 claims during its last reporting year. The Southern California Lumber Industry Health and Welfare Fund is a health and welfare plan with 8,200 participants and 560 contributing employers. It received 42,000 claims during its last reporting year. The Southern California Lumber Industry Retirement Fund is a pension plan with 7,600 participants and 460 contributing employers. It received 420 claims during its last reporting year. The Spokane Area Hotel and Restaurant Employees Trust Fund is a health and welfare plan with 659 participants and 25 contributing employers. It received 4,263 claims during its last reporting year. Together, these plans processed 479,775 claims during their last reporting year.

The Ninth Circuit's ruling below has extraordinarily severe implications for the administration and financial well-being of all employee benefit plans. But, that decision has particularly severe consequences for multiemployer plans.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983), and appears in the Appendix to the petition at pages 1a to 25a. The order of the United States District Court for the Central District of California granting petitioner's motion for summary judgment, as well as the findings of fact and conclusions of law issued in connection therewith, are unreported and appear in the Appendix to the petition at pages 26a to 32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 16, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by that Court on April 6, 1984. Appendix to petition at page 34a. The petition for writ of certiorari was docketed on July 5, 1984. The jurisdiction of this Court was invoked by petitioners pursuant to 28 U.S.C. § 1254(1). This Court granted certiorari on October 1, 1984.

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 409, 501, 502 and 503 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1109, 1131, 1132, and 1133, and 29 C.F.R. § 2560.503-1 promulgated pursuant to ERISA § 503. These provisions are reproduced in the Appendix to the petition at pages 35a to 48a.

STATEMENT OF THE CASE

Respondent, Doris Russell (Russell), was an employee of a California office of the petitioner, Massachusetts Mutual Life Insurance Company (Mass Mutual).[1] Mass Mutual sponsors two employee benefit plans which provide disability benefits to eligible employees. Both plans are provided at no cost to employees and are funded by

[1] Amici Curiae accept petitioner's statement of the case, but provide a synopsis of it herein.

the general assets of the company. Both plans are covered by ERISA.[2]

Russell filed a disability claim under the company's salary continuance plan in May, 1979, asserting that she could not work because of a back problem. Mass Mutual began payment of benefits.

In August, 1979, the claim was reviewed by Mass Mutual's Disability Committee. The Disability Committee referred Russell to an orthopedic surgeon. In September, 1979, this specialist examined Russell and concluded that, from an orthopedic perspective, she was not physically disabled. On October 17, 1979, Russell was notified that disability payments would be discontinued upon the recommendation of the Disability Committee. Russell was also advised of her right to appeal that decision to the Plan Administrator.

On October 22, 1979, Russell wrote to the Director of Group Claims (not to the Plan Administrator) and asked for additional information regarding the termination of her benefits and for an application for long-term disability benefits. She also stated her intention to appeal the termination of her disability benefits and to submit additional medical information.

On November 27, 1979, Russell wrote to the Plan Administrator concerning her appeal and submitted additional evidence, including a report from her psychiatrist which indicated that she was suffering from a psychosomatic disability with physical manifestations rather than an orthopedic disability.

The Mass Mutual Plan Administrator treated Russell's letter of November 27, 1979 as a formal appeal and referred it to the Disability Committee. Russell was examined by an independent psychiatrist, who confirmed that Russell suffered from a psychiatric disability in a report dated February 15, 1980. On the

[2] Petitioner Cecilia Stevenson, an employee of Mass Mutual, was Russell's supervisor at Mass Mutual.

basis of this report, the Disability Committee recommended that Russell's benefits be reinstated retroactively. The Plan Administrator adopted this recommendation and informed Russell of his decision on March 11, 1980. Payment of all benefits due was made two days later.

Although she received full benefits from both plans, Russell sued Mass Mutual in California Superior Court on December 9, 1980 for compensatory and punitive damages for the "untimely and improper" handling of her benefit claim,[3] which allegedly resulted in economic loss and mental anguish.[4]

After removal of the case to the United States District Court for the Central District of California on the ground that the case was governed by ERISA,[5] the District Court granted a motion by Mass Mutual for summary judgment. The court first held that all of Russell's state law claims arising from the processing of her claim for disability benefits were pre-empted by ERISA. The court then concluded that, as a matter of law, punitive and compensatory damages are not available to plan participants under ERISA. By so ruling, the court tacitly acknowledged that a plan participant only has a claim against the plan for non-payment of benefits and costs of litigation, including fees. Because Russell had been paid benefits in full, she was not entitled to any additional relief. The Court found that

[3] Other employment-related claims were also asserted; the only claim addressed herein by the amici curiae is Russell's claim with respect to her disability benefits.

[4] Russell claimed, *inter alia*, that Mass Mutual's delay forced her husband, who was also unemployed on the grounds of disability, to cash out his retirement savings plan. Russell alleged that she and her husband lost the security of lifetime benefits. Russell also sought damages for emotional distress and claimed that her pre-existing psychosomatic illness was aggravated as a result of the improper and untimely handling of her claim.

[5] Mass Mutual removed this action pursuant to 28 U.S.C. § 1441 (a), alleging the existence of federal jurisdiction under 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331(a).

Russell's appeal was filed on November 27, 1979 and rejected her contention that she was entitled to damages because her claim had not been processed in 120 days, as required by regulations promulgated under ERISA § 503, 29 U.S.C. § 1133. See 29 C.F.R. § 2560.503-1(h) (1983).[6]

The Ninth Circuit affirmed the District Court's holding that Russell's state law claims were pre-empted by ERISA. However, the Ninth Circuit reversed the District Court's grant of summary judgment. The appellate court held that Russell's complaint had stated a claim under ERISA for breach of fiduciary duty based on the allegedly improper or untimely handling of her appeal. The Court of Appeals determined that Russell's appeal began with her initial letter of October 22, 1979 and that Mass Mutual, therefore, rendered its final determination *twelve days* beyond the 120-day limit.

The Court of Appeals went on to hold that such a claim could support an award of both compensatory and punitive damages. The appellate court based its opinion on an interpretation of ERISA § 409, 29 U.S.C. § 1109. It held that Section 409, which expressly imposes upon fiduciaries a *personal* liability to the plan for fiduciary breaches, also makes fiduciaries personally liable to individual participants with respect to benefit claims. The Ninth Circuit is the only appellate court to have held that Section 409 authorizes recovery against plan fiduciaries by individual participants for denial of a benefit claim.

SUMMARY OF ARGUMENT

The ruling of the Ninth Circuit is inconsistent with both the terms of ERISA and the Act's underlying legis-

[6] The regulations which require benefit claims to be decided within 120 days do not provide affirmative relief. These regulations simply provide that, in the event of the plan's failure to render a decision within that time, "the claim shall be deemed denied on review." 29 C.F.R. § 2560. 503-1(h)(4). The participant can then file suit under ERISA Section 502 without fear that a defense of failure to exhaust remedies can be raised.

lative policy. ERISA, which is a "comprehensive and reticulated statute", provides two distinct and separate sets of remedies: one for employee benefit plans themselves and one for benefit claimants. The remedies available to employee benefit plans are contained in ERISA Section 502. That provision expressly authorizes awards of personal liability against plan trustees and other fiduciaries who breach their fiduciary obligations to the plan. The exclusive remedies available to persons claiming that benefits were erroneously denied them or that claims were improperly processed are set forth in ERISA Section 409. The latter provision specifically limits relief to the benefits due plus attorneys' fees and other costs of litigation. Remedies under Section 409 are awarded against plans only. Section 409 does *not* authorize awards of damages against trustees or other fiduciaries personally. Neither of these carefully crafted remedial provisions authorizes awards of either punitive or extra-contractual compensatory damages.

Congress, by creating a separate remedial provision for persons seeking benefits, balanced the need to encourage care in the administration of benefit claims with its express policy of encouraging the growth of the private pension system. The Ninth Circuit's rewriting of ERISA's remedial scheme has upset the balance struck by Congress. Unless it is overruled, the decision below will cause serious injury to multiemployer benefit plans and hence to their participants.

The ruling below will severely injure multiemployer plans because it will undermine the prudent and careful administration of such plans. Out of a fear of litigation and concomitant risk of personal liability, trustees and fiduciaries will become likely to acquiesce in questionable claims to the detriment of a plan's financial soundness. The ruling will also injure multiemployer funds by effectively deterring responsible persons from serving as trustees and fiduciaries.

The ruling below will further injure multiemployer plans by irretrievably damaging the informal dispute resolution process favored by the Act. With the prospect of personal liability facing them in every case of benefit determination or administration, plan trustees are likely to become far less flexible in resolving benefit claims out of a concern that a change of mind will later be asserted as evidence of impropriety. The lack of flexibility will inevitably result in increased litigation. Indeed, some benefit claimants may be encouraged to forego an informal resolution in the hope of also obtaining a windfall award of punitive damages.

ARGUMENT

I. The Ninth Circuit's Ruling is Inconsistent with ERISA's Terms and Underlying Policy

The Ninth Circuit's ruling that punitive and extra-statutory compensatory damages may be awarded to plan participants and beneficiaries is contrary to the plain words of ERISA. It is, moreover, inimical to the carefully tailored policies established by federal pension law. The Ninth Circuit's ruling is in error principally for two reasons. ERISA was carefully crafted by Congress to provide that awards of damages against trustees or other fiduciaries personally were to be only in favor of the funds themselves and *not* individual participants and beneficiaries. And, ERISA does not authorize the awarding of punitive damages to anyone.

In this section of our brief we first outline (in Part A) the different rules established by ERISA to protect plans as a whole and individuals entitled to benefits. We next (in Part B) review the remedial provisions of ERISA and show that they do not permit recovery by individual claimants from fiduciaries for benefit claims decisions. We then demonstrate (in Part C) that ERISA contains no authorization for awards of punitive damages. Finally (in Part D), we show that the Ninth Circuit's ruling has upset, without justification, the carefully crafted statutory scheme enacted by Congress.

A. *ERISA Established Interrelated but Separate Rules to Protect Employee Benefit Plans and their Individual Participants and Beneficiaries*

As this court has observed, ERISA is a "comprehensive and reticulated statute" in which Congress established many detailed rules to further "the well-being and security of millions of employees and their dependents" and to remedy the numerous flaws in the private pension plan system. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980), reh. denied, 448 U.S. 908 (1980). ERISA improved the benefit security of Americans in two distinct ways: it promoted the financial integrity and growth of employee benefit plans and it established rules protecting the receipt of benefits by individuals. The two approaches were clearly interrelated, since the financial stability of plans ultimately protects the benefits of participants entitled to benefits under the plans.

ERISA protects individual benefits through participation and vesting requirements, and through reporting and disclosure rules. The vesting and participation rules protect individuals' entitlement to benefits. The reporting and disclosure rules protect the right of individuals to receive information about plan benefits.

Congress also wanted to promote the growth of employee benefit plans because such growth would lead to improved benefit security for millions of Americans. ERISA promotes the growth and stability of employee benefit plans by establishing funding requirements for plans and rules for fiduciary behavior. The funding rules require plans to provide adequate long-term funding for benefits payable in the future. The fiduciary rules impose strict requirements of prudence and impartiality upon all persons having discretionary authority over plan assets. However, the fiduciary rules, while stringent, do not deter qualified individuals from serving as plan fiduciaries because they are clear and do not

penalize fiduciaries for informed good faith discretionary decisions.

B. *ERISA Provides Remedies for Individuals Which Are Different from Those Available to Plans*

ERISA differentiates between remedies available to plans themselves and remedies available to individual participants and beneficiaires who are claiming benefits. The statute expressly imposes personal liability upon fiduciaries to make plans whole for any loss resulting from a breach of a fiduciary obligation or to disgorge any profit made as a result of such breach. Indeed, ERISA also provides for payment of excise taxes by fiduciaries and other parties in interest who violate the prohibited transaction rules (which prohibit self-dealing). The excise taxes are assessed and collected by the Internal Revenue Service. 26 U.S.C. § 4975. But, ERISA does not authorize the assessment of personal liability in favor of a plan beneficiary who has sued with respect to a benefit determination.

The remedies of personal liabilty are reserved for breaches of fiduciary duties to plans themselves because ERISA's rules of fiduciary conduct were designed principally to protect plans from losses caused by fiduciary malfeasance or negligence. An erroneous benefit determination or inappropriate administration of a claim does not result in an economic loss to an employee benefit plan. The Fund would, in any event, eventually be required to pay the claim. Neither does an erroneous benefit determination result in any personal financial benefit to a plan fiduciary. An assessment of personal liability against a fiduciary in favor of a benefit claimant simply is not consistent with the Act's fiduciary scheme.

The separateness of the Act's two remedial schemes is especially evident when one notes that ERISA § 409 provides equitable and remedial relief for fiduciary

breaches *only* to plans themselves. That provision is *not* applicable to relief sought by individual participants.[7] Relief for individual participants and beneficiaries who have been denied benefits is *exclusively* pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This latter provision does *not* authorize the imposition of personal liability upon fiduciaries for any compensatory or punitive damages to individual participants or beneficiaries. Rather, it limits benefit claimants to recovery of benefits due from the plan and to costs of litigation, including attorneys' fees.

The Ninth Circuit's ruling effectively rewrites the latter provision. By imposing upon plan fiduciaries extrastatutory personal liability for their benefit determinations and administration, the Ninth Circuit substituted its judgment for the policy choices made by Congress when it enacted and amended ERISA.

C. *ERISA Does not Provide for any Imposition of Punitive Damages*

While ERISA provides detailed remedies to plans and beneficiaries and imposes the payment of excise taxes as a penalty for some violations, it makes absolutely *no* provision for the imposition of *any* punitive damages payable to plans or to individual claimants. The personal liability of fiduciaries for fiduciary breach is designed to compensate the plan for any actual loss or for income

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[7] ERISA's legislative history confirms that any recovery under Section 409 necessarily benefits the plan as a whole. See, e.g. H. Conf. Rep. No. 1280, 93d Cong., 2nd Sess., p. 320 (1974), reprinted in *Legislative History of the Employee Retirement Income Security Act of 1974 (Legislative History)* (1976) U.S. Government Printing Office, p. 4587 (personal liability of fiduciary for losses to the plan resulting from fiduciary breach) and S. Rep. No. 127, 93d Cong., 1st Sess. 33 (1973), reprinted in *Legislative History*, p. 619 (personal liability of fiduciary to reimburse fund for losses resulting from fiduciary breach and to turn over any profits obtained by use of fund assets).

that should have inured to the plan but for the breach. Similarly, a plan's liability to an individual entitled to a benefit is limited to the benefit and the costs incurred in any litigation to obtain the benefit.

The Eighth Circuit has recognized that punitive damages are not available to individual benefit claimants under ERISA. In *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), cert. denied, 454 U.S. 968 (1981), that court stated:

> We do not think that punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts.

653 F.2d at 1216; see also *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984), which held that punitive damages are not available in an action for plan benefits under ERISA § 502(a)(1)(B). The Eighth Circuit recognized that the extraordinary remedy of punitive damages could not be added to ERISA by judicial fiat. So too has a strong majority of the district courts that have considered the question. See *Whitaker v. Texaco*, 566 F. Supp. 745 (N.D. Ga. 1983) and cases cited therein.

This court has also held, in a recent decision, that punitive damages cannot be recovered from a municipality under 42 U.S.C. § 1983 (the Civil Rights Act of 1866) because nothing in that law or its legislative history indicated that Congress intended to abolish the traditional municipal immunity from punitive damages. *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 263-64 (1981). This Court found, in that case, that "the exclusion of punitive damages was no oversight," but, rather, a deliberate Congressional choice. 453 U.S. 265. Similarly, in the case of ERISA, Congress' exclusion of

punitive damages from the statutory framework of ERISA was not an oversight that should be remedied by judges. It was a deliberate policy choice. Congress considered, and adopted, a myriad of remedial measures designed to secure the financial integrity of employee benefit plans and the rights of individuals entitled to benefits under those plans. Congress simply did not find that the draconian remedy of punitive damages was necessary for its purposes.

D. *By Effectively Altering the Provisions of ERISA, The Ninth Circuit Has Usurped the Legislative Function*

The different remedial provisions of Sections 409 and 502 reflect the delicate balance struck by Congress among the multiple purposes served by ERISA. Among the most important of those purposes are: (1) the promotion of the expansion of the private pension plan system; (2) the deterrence of fiduciary malfeasance; and (3) the securing of benefits expected by individual participants and beneficiaries. Congress balanced the prophylactic effect of the imposition of personal liability upon fiduciaries as a deterrence for malfeasance against the need to promote expansion of pension plans. Congress determined that personal liability to the plan for fiduciary breaches would deter malfeasance, but that excessive imposition of personal liability (such as was created by the Ninth Circuit) would hamper the creation of new plans, the expansion of existing ones, and the recruitment of plan trustees.

Congress, in balancing competing concerns, clearly felt that deterrent measures (such as the imposition of personal liability) designed to prevent abuses of plan resources were not an appropriate way of dealing with errors made in connection with benefit claims by participants. Balancing the need for encouraging the exercise of care in benefit claim determinations and adminis-

tration against its policy of promoting pension plan expansion, Congress authorized full recovery of benefits due to individuals from plans, as well as costs of litigation (including attorneys' fees). But, it did not go so far as to impose personal liability upon plan fiduciaries for either compensatory or punitive damages. ERISA is carefully crafted to deter malfeasance in the management of plans, provide remedies to individual claimants, and yet not create barriers to the expansion of the private pension system. This Court has, in other circumstances, observed that there must be a "careful balance of individual and collective interests" in *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (punitive damages are not available for claims of breach of duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151 et seq.). Congress created such a balance in ERISA.

One additional point must be made concerning the Ninth Circuit's rewriting of ERISA's remedial provisions. Congress designed ERISA to be a nationwide, uniform system of administration for employee benefit plans. Prior to ERISA, such plans were governed by the principles of trust law, which varied considerably from state to state. Such state variation precluded uniform plan administration and was particularly prejudicial to large nationwide plans, such as collectively bargained multiemployer plans. One of Congress' purposes in passing ERISA was to remedy this problem:

> The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state law.

Report of House Education and Labor Committee on H.R. 12906, 93rd Cong., 2nd Sess. 1974, reprinted in *Legislative History of the Employee Retirement Income Security Act* (1976) U.S. Government Printing Office,

p. 3308. The grafting of punitive damages onto the framework of ERISA would subvert the goal of national uniformity. This is so because punitive damages are generally awarded pursuant to state law principles. The exposure of plan fiduciaries to such damages will result in divergent, inconsistent rulings throughout the many courts of this country.

The Ninth Circuit upset the careful balance struck by Congress without any justification. The imposition of personal liability upon plan fiduciaries for prior errors in claims processing does not significantly add to the deterrent effect of the measures expressly provided by Congress to prevent fiduciary malfeasance. Neither does it add to the ability of individual participants to secure benefits. Benefits are already secured under the benefit recovery provisions of Section 502. But, the Ninth Circuit's ruling has extremely deleterious effects on plans. Unless it is reversed, the decision will adversely alter the decision-making procedures of plan trustees and, by discouraging responsible persons from serving as trustees, significantly inhibit the expansion of the private pension plan system. We now turn to a discussion of these consequences as they apply to multiemployer plans.

II. The Ninth Circuit's Ruling Will Have a Severe Adverse Impact on Multiemployer Benefit Plans and their Participants

Multiemployer plans are integral to the financial security of millions of Americans. The Ninth Circuit's ruling will injure multiemployer plan administration, deter qualified individuals from serving as plan fiduciaries, discourage the process of dispute resolution established by ERISA, and expose fiduciaries to liabilities that they cannot estimate and for which they may be unable to insure themselves. It is likely, moreover, to result in increased litigation against plans (with a concomitant increase in plan administrative costs) since

benefit claimants may file suit or refrain from compromise so that they might seek the windfall of an award of punitive damages. The cumulative effect of this is to undermine the stability of multiemployer plans and effectively halt their expansion. In this section of our brief, we first provide the Court with a brief summary of the structure of multiemployer benefit plans and a discussion of the vital role they play in the benefit security of millions of Americans. We then review the ways in which the Ninth Circuit's decision will adversely affect such plans.

A. The Nature and Importance of Multiemployer Benefit Plans to the Retirement Security and to the Health and Welfare Benefits of Millions of Employees

Multiemployer employee benefit plans play a vital role in the financial well-being of millions of workers. They enable the employees of small and medium sized companies to obtain the level of pension and health and welfare benefits only available from large plans. They permit employees who work for more than one employer in the same industry to accumulate meaningful pension benefits. They also protect pension benefits when an employer leaves the plan. Multiemployer plans support two important features of the American economy: small businesses and a mobile workforce.

Small and medium sized companies often cannot afford sophisticated and generous employee benefits such as those provided by large corporate plans. Large employee benefit plans can profit from substantial economies of scale and can also more accurately reflect the science of "averages," which forms the basis of actuarial predictions. An increase in plan size considerably reduces the risk that a plan may suffer financial adversity because its benefit claims experience does not accurately mirror statistical predictions.

Because multiemployer pension plans generally include many employers in an industry, an employee moving from one employer in the plan to another continues to accumulate benefits without interruption. By their very nature, multiemployer plans provide a form of "portable" benefits which do not exist elsewhere. These portable benefits result in greater benefit security. Multiemployer plans also protect pension benefits because they provide benefits to an employee even though his or her employer leaves the plan.

Congress has recognized that multiemployer plans "typically provide workers with greater retirement security than single employer plans." Senate Labor Committee Summary and Analysis of Consideration of S.1076 (April 1980) *U.S. Code Cong. & Admin. News*, p. 2985. Accordingly, Congress has repeatedly passed legislation to strengthen multiemployer plans. The most comprehensive effort in this regard was the Multiemployer Pension Plan Amendments Act of 1980, which amended ERISA by imposing withdrawal liability upon employers who withdraw from multiemployer pension plans. Section 3 of the Act explicitly states that it is Congressional policy to encourage the maintenance and growth of multiemployer pension plans.[8]

Multiemployer benefit plans are established through collective bargaining agreements. The Taft-Hartley Act of 1947 specifically provided for the formation of trusts to administer health and welfare and pension funds for employees represented by labor unions in collective bargaining with management. 29 U.S.C. § 186(c)(5) and

[8] The 1980 Amendments to ERISA were enacted by Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980). For further discussion of Congressional policy to encourage the maintenance and growth of multiemployer pension plans, see House Ways and Means Committee Report on H.R. 3904 (Rept. 96-869, Part II, April 23, 1980) and House Labor Committee Report on H.R. 3904 (Rept. 96-869, Part I, April 2, 1980).

(6). That statute also required such plans to be managed by trustee boards equally divided between representatives of management and of labor. See *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) for a description of the functioning of such trustees.

Collectively bargained multiemployer benefit plans provide coverage to millions of American workers. Multiemployer pension plans are primarily defined benefit plans. Multiemployer pension plans represent only 2.3% of all pension plans and 3.2% of all defined benefit pension plans. Nonetheless, defined benefit multiemployer pension plans provide pension coverage to 20-26% of all defined benefit pension plan participants.[9] In 1980, there were 1,826 multiemployer defined benefit pension plans in the country. These pension plans covered 8.5 million active workers and over 10 million total participants and beneficiaries.[10]

Multiemployer health and welfare funds provide a similarly large proportion of benefits to American workers. Collectively bargained multiemployer health and welfare plans represent about 10% of all health and welfare plans. Such plans include about 25% of all workers with health and welfare coverage.[11] In 1980, there were 4,500 multiemployer health and welfare funds, of which 3,040 provided basic hospitalization and other health benefits to 8.1 million participants.[12]

[9] Robert D. Cooper and Melody A. Carlsen, *Pension Fund Operations and Expenses (Pension Fund Operations)*, p. 21 (1980) International Foundation of Employee Benefit Plans, Brookfield, Wisconsin.

[10] Cooper, *Pension Fund Operations*, p. 22 n.5, pp. 28 and 85.

[11] Robert D. Cooper, *Multiemployer Health and Welfare Plan Operations and Expenses (Multiemployer Health and Welfare Plan)*, p. 14 (1983) International Foundation of Employee Benefit Plans, Brookfield, Wisconsin.

[12] The other 1,460 health and welfare plans provide other benefits, such as vacation, unemployment, etc. Cooper, *Multiemployer Health and Welfare Plan*, p. 14 n.5.

Multiemployer pension plans annually process hundreds of thousands of benefit claims. Multiemployer health and welfare plans annually process millions of claims. A conservative estimate of monthly average claims processed by multiemployer health and welfare funds in 1979 was between 1,130 and 1,166.[13] The monthly average of claim checks written by such funds was between 1,070 and 1,090.[14] All of these claims are processed by trustees or by administrators acting on their behalf or through insurance carriers. Even when claims are processed by insurance carriers, trustees usually reserve the right to supervise the handling of claims.

Multiemployer trustees are familiar with the particular needs of their industry and are best able to design plans to fit those needs. They frequently devise claims processing and review procedures that meet the needs of individuals working within their industry. While plan trustees and administrators closely monitor the establishment and administration of claims processing rules, they cannot personally handle the volume of claims that must be processed. Some delegation of routine ministerial tasks is essential in order for plan trustees and other fiduciaries to provide for prompt review of all submitted claims.

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[13] Robert D. Cooper and Hetty K. Balanoff, *Technical Report: A Study of Taft-Hartley Health and Welfare Trust Fund Operations Cost (Technical Report)*, p. 41 (1979) International Foundation of Employee Benefit Plans, Brookfield, Wisconsin. This source, in all likelihood, underestimates the number of claims processed on account of the great variation among plans as to what is considered a "claim." For example, "if an illness generated six bills, each of which was submitted individually, was this six claims? Or if the same six bills were submitted all at once, were these only one claim?" (p. 18). Some funds (46.4%) consider each check a claim, some (39.3%) consider each illness a claim, and some (10.3%) consider each separate piece of paper a claim (p. 41).

[14] Cooper, *Technical Report*, p. 41. Again, these numbers may underestimate the number of actual claims because some plans write one check for several claims submitted by one claimant.

Multiemployer benefit plans perform a valuable public service. They provide benefit coverage to millions of Americans who might otherwise be in dire financial need and process a tremendous volume of benefit claims. The Ninth Circuit's decision will weaken the multiemployer benefit plan system, thereby affecting the benefit security of all workers.

B. *The Ninth Circuit's Ruling will Severely Injure Multiemployer Benefit Plans and their Participants because it will Undermine the Prudent and Careful Administration of Such Plans*

The financial well-being of multiemployer benefit plans, and of their participants and beneficiaries, is dependent upon careful, prudent and reasonable management of all aspects of the plan, including the area of benefit claims processing.

Plan trustees design benefit systems and devise and implement procedures for processing and evaluating claims. While it is, of course, important to make prompt payment of all justified claims, it is likewise important to refuse payment of claims that do not meet plan requirements. Indeed, ERISA § 404(a)(1)(D) mandates this: ". . . a fiduciary shall discharge his duty . . . in accordance with the documents and instruments governing the plan . . . ." If plan requirements were not scrupulously followed, plan assets would be squandered and the benefit security of all participants would be undermined. Plan trustees must balance the interest of the individual benefit claimant against the interests of all other participants in safeguarding the plan's assets through accurate and prudent claim administration.

ERISA does not require that plan trustees and administrators resolve all doubts in the individual participants' favor. Rather, ERISA § 404, 29 U.S.C. § 1904, requires only that fiduciaries act prudently with respect to the plan. They must not make benefit determinations arbitrarily or capriciously. "The trustees of a . . . fund have,

not only the authority, but the duty to insure that payments are made to only those who are eligible." *Feathers v. U.M.W. Health and Retirement Funds*, 99 L.R.R.M. 2287 (D.D.C. 1978).[15] The fiduciaries of a plan must jealously guard the benefit security of *all* participants.

ERISA safeguards individual rights by providing the right to obtain accurate data regarding plan benefits and by requiring prompt claim processing. ERISA § 503 provides that plans must provide "adequate notice" of any benefit denial, "written in a manner calculated to be understood by the participant," and that plans must provide "reasonable opportunity" for a "full and fair review" of any benefit denial. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), further protects the rights of benefit claimants by providing for full recovery of benefits due from a plan plus attorneys' fees and costs.

The Ninth Circuit's interpretation of ERISA § 409 will cause plan fiduciaries to be especially fearful of litigation whenever they review claims because of the possibility that a benefit claimant may seek to assess personal liability against them individually. This very justified fear will significantly distort the entire decision-making process concerning claims. Trustees will be far more likely to acquiesce in the payment of questionable claims. While the approval of one questionable claim will not likely weaken a plan, the cumulative effect of fiduciary acquiescences to such claims over time certainly will have that effect.

C. *The Ninth Circuit's Ruling will Deter Qualified Persons from Serving as Fund Trustees and Administrators*

Multiemployer benefit plans are primarily labor-management funds that are administered by joint boards of labor and management trustees. Unlike single employer plans, multiemployer plans frequently are administered

[15] See also *Moglia v. Geoghegan*, 403 F.2d 110, 116 (2nd Cir. 1968); *Brune v. Morse*, 475 F.2d 858 (8th Cir. 1973); *Boyles v. Central States, Southeast, Etc.*, 602 F.2d 97 (5th Cir. 1979).

by management trustees who work for geographically dispersed companies (many of them quite small) and by union trustees who are also frequently dispersed geographically.

Labor and management trustees are not compensated for their time because such payments are prohibited by ERISA § 408(a)(2), 29 U.S.C. § 1108(a)(2). Trustees of single employer plans, who generally work for the plan sponsor, have many strong institutional incentives to perform an important company function by service as trustees. Such persons do not risk a loss of income by serving as trustees. On the other hand, trustees of multiemployer plans receive no institutional rewards for their service. Employer trustees must forego management of their business and may lose income because they take time to serve as trustees; union trustees must forego their organizing tasks. Multiemployer plan trustees agree to serve because of a serious commitment to employee benefit security and because of a desire to perform a service to their union members or to their employees.

Trustees are well aware that the fiduciary requirements of ERISA mandate prudent, honest and selfless plan administration. They are also aware that fiduciary breaches injurious to the fund may result in the imposition of personal liability against them to remedy any injury caused to the fund or to pay excise taxes to the Internal Revenue Service. Generally speaking, fiduciaries can fulfill their obligations and avoid breaches of fiduciary duty by carefully selecting investment managers, accountants, and administrators to perform the day-to-day administrative tasks of the fund, and by thorough periodic review of plan reports, operations, personnel decisions and policies.

Prior to the decision of the Ninth Circuit in this matter, trustees did not fear that personal liability might arise from every benefit decision or ministerial task performed by plan employees or agents. Thus, prior to the

Ninth Circuit's decision, responsible individuals with sound financial and administrative skills have been willing to serve as trustees of multiemployer funds because they could adequately perform their fiduciary duties by providing management and direction without direct involvement in individual claim processing details.

By drastically expanding the scope of personal liability of trustees beyond that contemplated by ERISA, the Ninth Circuit has provided a powerful disincentive for any reasoning person from serving as trustee of a multiemployer plan. Now, the otherwise responsible, prudent trustee is personally liable for any delays or errors of judgment in the handling of benefit claims. The Ninth Circuit has made it virtually impossible for the traditional multiemployer trustee to function. Since multiemployer trustees are generally not compensated, it will be extremely difficult, if not impossible, to find competent labor and management trustees willing to serve in the face of such risk.

Similarly, competent individuals with administrative and financial expertise will be deterred from serving as administrators of multiemployer plans because each daily task that they perform may result in substantial personal liability. Indeed, every task delegated by a plan administrator to a clerical employee will expose her or him to potentially runious personal liability.

The exposure to liability which the Ninth Circuit's fiat has imposed is far beyond the scope of that contemplated by Congress. Congress intended to deter fiduciary malfeasance. But, it did not intend to make service as a voluntary trustee so onerous and fraught with risk as to discourage competent and responsible persons from serving at all.

The result of the Ninth Circuit's decision will be the transfer of all plan functions from labor and management trustees (as envisioned by Congress) to large banks and insurance companies. This result will deprive this country of vital leadership that has previously worked

well to provide benefits to millions of Americans. It will also diminish a major area of labor-management cooperation that Congress has specifically sought to nurture.

D. *The Ninth Circuit's Ruling is Injurious to the Dispute Resolution Process Favored by ERISA*

ERISA § 503, 29 U.S.C. § 1133, and regulations promulgated thereunder, favor internal administrative resolution of disputes concerning benefit claims. Section 503 requires plans to provide adequate notice and explanation of any denial of benefits and a "full and fair review" to all claimants who appeal denials of benefits. This general provision is further elaborated by regulations set forth at 29 C.F.R. § 2560.503-1.

The regulations impose certain requirements for reasonable claims procedures established by plans. Plans must provide for reasonable claim filing procedures that must be communicated to participants. If such procedures are not established, a claim is deemed filed when the participant brings it to the attention of the plan.

Plans must also provide notice and explanation of any denials of claims within 90 days, or, at the most, within 180 days if special circumstances exist. The notice must set forth (1) the reason for benefit denial; (2) the plan provisions on which denial is based; (3) a description of any additional information or materials needed to perfect the claim; and (4) information about how to obtain a review of the denial of benefits.

Finally, plan participants must be given the opportunity to appeal denied claims to the appropriate fiduciary or to a person designated by the fiduciary. The participant must be given access to all pertinent plan documents and an opportunity to submit issues and comments in writing. The decision on review must be made promptly, usually within 60 days after receipt of the request for review, or, under special circumstances (such as the scheduling of hearing), within 120 days after receipt.

The procedures outlined above are designed to promote dispute resolution through the exchange of information by plans and participants. The procedures require a plan to disclose the reasoning behind every denial of benefits and to state if any additional information may change the results. This gives participants the opportunity to offer relevant information that might have been originally overlooked. The resulting process is an essentially nonadversarial dialogue between the plan and the participant that is designed to raise all the arguments and information pertinent to the denied claim and to avoid unnecessary litigation.

Courts have generally required claimants to exhaust their internal plan remedies before filing suit under ERISA § 502. See e.g. *Lucas v. Warner & Swasey Company*, 475 F.Supp. 1071 (E.D. Pa. 1979); *Kross v. Western Electric Co., Inc.* 701 F.2d 1238 (7th Cir. 1983), aff'g in part and rev'g in part, 534 F.Supp. 251 (1982). This is so because the dispute resolution mechanism provided by ERISA is particularly well-suited for resolving disputes that are based on a misunderstanding of plan rules or on incomplete information. Because the internal dispute resolution mechanisms of plans so successfully accomplish their purposes, the federal courts are not overburdened by litigation of routine benefit disputes.

The case at bar is a good example of the proper functioning of internal plan dispute resolution. The participant was advised of the specific reasons for the denial of her claim, had the opportunity to, and did present, additional information, and was ultimately granted full benefits on the basis of information obtained through the dispute resolution process.

The Ninth Circuit's decision will irretrievably damage this valuable and efficient process. Since plan trustees and administrators may now be subject to litigation and to grave personal liability for the performance of even routine ministerial plan functions, they will have a

tendency to be guarded and cautious when dealing with benefit claim denials. They will be hesitant to set forth all the issues frankly and will be reluctant to receive any additional information for fear of violating the time requirements mandated by the regulations. They will also be concerned that any change in a benefit determination result may be used later against them as evidence of impropriety. Flexibility in plan administration will inevitably be reduced thereby resulting in even more litigation. Indeed, some participants may be encouraged to forego a settlement resolution without litigation in the hopes of also obtaining a windfall award of punitive damages.

Before the Ninth Circuit's decision, litigation over benefit claims denials could only result in full payment of the disputed claim and costs incurred in seeking plan benefits. Now, such litigation also threatens unknown and potentially enormous personal liability. The change in fiduciaries' behavior resulting from this new liability concern will decrease the internal resolution of benefit claim disputes and significantly increase the volume of litigation in the already burdened federal courts.

E. *Compensatory and Punitive Damages are not Uniformly Awarded and are Frequently Large and Inconsistent*

Compensatory damages to a claimant whose claim has been erroneously denied or mishandled include damages for all losses and injuries sustained by the claimant as a result of the erroneous determination or claim processing error.[16] The individual elements of compensatory damages vary widely from state to state, and may include such unpredictable elements as damages for mental anguish.[17] Mental anguish has been variously defined as

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[16] See e.g. *Ross v. United States*, 640 F.2d 511 (5th Cir. 1981); *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300 (5th Cir. 1976); and 22 Am. Jur. 2d Damages § 11, n.12.

[17] See e.g. *Stoleson v. United States*, 708 F.2d 1217 (7th Cir. 1983); *Hysell v. Iowa Public Serv. Co.*, 559 F.2d 468 (8th Cir.

nervous shock, fright or humiliation.[18] For instance, the Ninth Circuit has held that under California law damages for embarassment, humiliation, fear or other forms of mental anguish are recoverable. *Moore v. Greene*, 431 F.2d 584 (9th Cir. 1970) and *Clark v. Celeb Pub., Inc.*, 530 F.Supp. 979 (S.D.N.Y. 1981) (relying on *Moore* as authority for damages recoverable under California law). The Ninth Circuit has also recently held that mental or emotional distress caused by a denial of due process may serve as a basis for recovery. *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773 (9th Cir. 1982).[19] There is no uniform standard of law by which asserted damages of this nature can be verified or measured. And, the amount to be awarded is particularly subjective.[20] The determination of mental suffering may be "essentially subjective" and "evidenced by one's conduct." *Cooper v. Department of Admin., State of Nev.*, 558 F.Supp. 244, 253 (D. Nev. 1982).

Punitive damages are even less predictable. By definition, they do not compensate the claimant for any actual injuries.[21] See *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 266 (1981). Thus, awards of punitive damages amounts are frequently arbitrary and may be many times greater than actual injuries. The following recent examples of punitive damages awards in California state court litigation illustrate this point:[22]

1977); *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460 (9th Cir. 1977); 22 Am. Jur. 2d Damages § 195; and Prosser, *Law of Torts* § 54, at 328 (4th ed. 1971).

[18] See 38 Am. Jur. 2d Fright, Shock and Mental Disturbance § 45.

[19] See also *Cooper v. Department of Admin., State of Nev.*, 558 F.Supp. 244 (D. Nev. 1982).

[20] See Am. Jur. 2d Damages §§ 109, 198.

[21] See Am. Jur. 2d Damages §§ 236, 237, 238.

[22] *Jury Verdicts Weekly*, Vol. 26 (1982) Nos. 5:8, 7:10, 12:4, 17:8 and 18:22; Vol. 27 (1983) Nos. 17:31, 44:16 and 52.21; Vol. 28 (1984) Nos. 11:8, 17:25 and 28:16. Jury Verdicts, Inc., Santa Rosa, California.

Name of Case	Superior Court	Type of Case	Actual Damages	Punitive Damages
Triple E. Machinery v. Englebrecht	Norwalk	Embarrassment and humiliation	$ 50,000	$ 102,327
Spieker v. Senator Hotel	Sacramento	Breach of contract	$ 343,310	$ 3,117,946
Downey Savings & Loan v. Ohio Casualty Ins. Co.	Los Angeles	Insurance Bad Faith	$ 123,769.	$ 5,000,000
The P.K.L. Companies v. Eaton Corporation	Los Angeles	Accounting Fraud and Breach of Fiduciary Duties	$2,633,599	$15,000,000
Elmer Sprague v. Equifax, Inc.	Compton	Independent Medical Examination Fraud	$ 100,000	$ 5,000,000
Berk v. National Union Fire Ins. Co.	Los Angeles	Insurance Bad Faith	$ 659,231	$13,054,479
Sullivan v. Kaiser Foundation Health Plan	San Diego	Failure to pay medical claim	$ 45,000	$ 400,000
Coconis v. Ins. Co. North America	San Francisco	Insurance bad faith	$ 3,500	$ 20,000
Gump v. Wells Bank	San Francisco	Breach of trust	$ 34,339	$ 1,000,000
Garvey v. State Farm	Sonoma	Insurance bad faith	$ 47,533	$ 1,110,000
Thompson v. Thompson	Sonoma	Breach of fiduciary duties—real estate	$ 17,000	$ 30,000

As is evident from these examples, no fiduciary will be able to predict the amount of his or her personal liability exposure to such damages.

The availability of insurance coverage for punitive and extrastatutory compensatory damages is doubtful at this time. But, even if such coverage ultimately became available, it would, no doubt, be prohibitively expensive precisely because the risk of liability is so difficult to predict or quantify.

CONCLUSION

The amici curiae urge this Court to reverse the Ninth Circuit because the lower court's decision is contrary to the language of ERISA and the Act's underlying legislative policy. It will, moreover, severely inhibit the expansion of multiemployer plans. In sum, the decision below threatens the vitality of an institution which provides employee benefit security to millions of Americans.

Respectfully submitted,

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No. 84-9 13

In The

Supreme Court of the United States

October Term, 1984

Massachusetts Mutual Life Insurance Company, and Cecilia Stevenson,
Petitioners,

v.

Doris Russell,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 5, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

64 pp

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5879

DORIS RUSSELL,
Plaintiff-Appellant,
v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, *et al.,*
Defendants-Appellees.

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1981	
Oct 19	DOCKET NUMBER ASSIGNED. -db- JS34 prepared
Oct 22	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. -db-
Nov 4	FILED CERT OF RECORD (10/28/81) -db-
Nov 4	APPELLANTS OPENING BRIEF DUE DECEMBER 14, 1981. -db-
Dec 14	Filed Orig & 15 aplt's opening briefs & 5 Excerpts. In two (2 volumes) (48 pgs, excluding the appendix) 12/11 ogm
1982	
Jan 8	Fld mtn & ord (CLK) gntg appellees an ext of time to file the answering brief to: 2-10-82. bbm

DATE	FILINGS—PROCEEDINGS
Feb 16	Filed orig & 15 Appellees' briefs & Excerpt (supplemental) of record. 2/10 ec
Feb 24	Fld mtn & ord (CLK) gntg appellants an ext of time to file the reply brief to: 3-10-82. bbm
Mar 15	Filed as of 3/12, Org & 15 Aplt's reply briefs. (25 pgs) 3/10 ogm
Mar 17	FILED AS OF NOVEMBER 4, 1981, CERTIFIE RECORD ON APPEAL IN THREE VOLUMES. PLEADINGS, VOLUMES I AND II, ONE COPY EACH ONLY; REPORTER'S TRANSCRIPT, VOLUME III, ORIGINAL ONLY. ONE ENVELOPE OF EXHIBITS IN LPS. ogm
May 5	Rec'd (IN LA) aplt's additional citations. (sent to panel by dpty in LA) -db-
May 5	ARGUED & SUBMITTED BEFORE FLETCHER, PREGERSON & REINHARDT, CJJ. -db-
Dec 16	ORDERED OPINION (REINHARDT) FILED & JUDG TO BE FILED & ENTERED. klm
Dec 16	FILED OPINION—AFFIRMED IN PART, REVERSED IN PART. klm
Dec 16	FILED & ENTERED JUDGMENT. klm
1984	
Jan 5	Filed order (FLETCHER, PREGERSON, REINHARDT, CJ's): Aplt Doris Russell is to be awarded costs on appeal. ra
Jan 10	Filed in L.A., as of January 6, 1984, orig & 3, appellees' EMERGENCY MOTION OF APPELLEES TO (1) STAY MANDATE and (2) TO ENLARGE TIME TO FILE PETITION FOR REHEARING. 1/6/84 (REINHARDT) pn

DATE	FILINGS—PROCEEDINGS
Jan 13	Filed Order (REINHARDT) Aplees' motion for an ext of time to file a petition for rehearing is granted. The petition shall be filed within 21 days of the date of this order. ec
Jan 23	Filed, orig only, appellant's MOTION OF APPELLANT TO FILE BILL OF COSTS w/BILL OF COSTS. 1/18/84 (fisher) pn
Feb 3	Filed, orig & 33, appellees' PETITION FOR REHEARING & SUGGESTION FOR REHEARING EN BANC. 2/2/84 15 pages (PANEL & TO ALL ACTIVE JUDGES) pn
Feb 28	Filed Order (Dep. Clrk) Appellant's motion for leave to file a late cost bill is granted. Costs are taxed in the amount of nine hundred forty dollars and fifty cents ($940.50). This order is subject to reconsideration if opposition is mailed within ten (10) days. pw
Apr 6	Filed Order (FLETCHER, PREGERSON, REINHARDT) The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED. pw
Apr 17	MANDATE ISSUED w/costs
July 20	RECVD SC notice of filing petition for writ of cert. on 7/5/84, SC#84-9. pn
Oct 10	Filed, as of Oct 4, 1984, certified copy of SC order of 10/1/84, granting certiorari. (COPIES TO PANEL) pn

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 81-0116-R

DORIS RUSSELL and RONALD RUSSELL,
Plaintiff,
v.
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, CECILIA STEVENSON, and DOES 1 THROUGH 50, INCLUSIVE,
Defendant.

DOCKET ENTRIES

DATE	PROCEEDINGS
01/09/81	1. Fld Petn for Removal w/cc of Summs & Complt.
	2. Fld Bond for Removal in the amnt of $500. frm Highlands Insur. Co. Bond #819247.
	3. Fld Notc of flg of petn for removal and removal bond.
1-12-81	4. Fld notc to cnsl
1-16-81	5. Fld defts notc of motn & motn to dism retnbl 2-17-81, 10AM
2-2-81	6. Fld joint stat rpt
2/9/81	7. Fld Stip & ORD(R) dsmsg complt as to pltf Ronald Russell; defts to fi & srv ans to complt w/in 10 das of entry of Crt's ord purs to this stip; Hrg presently scheduled for 2/17/81, be tkn off cal. (ENT 2/10/81) Mld cpy defts.
2-23-81	8. Fld defts', Massachusetts Mutual Life Insurance Co. & Cecilia Stevenson's ANSWER TO COMPLAINT

DATE	PROCEEDINGS
3-27-81	9. Fld notc of hrg re disml for want of prosecutn retnbl 4-13-81, 10AM
4-28-81	10. Fld defts notc of change of address of attys
5-15-81	11. Fld notc of PTC retnbl 7-20-81, 10AM
6-19-81	12. Fld Stip & ORD cont PTC to 8-17-81, 10AM
6-25-81	13. Fld Stip & ORD cont PTC to 8-24-81, 10AM
7-7-81	14. Fld pltf's DEMAND FOR TRIAL BY JURY
7-8-81	15. Fld pltfs notc of tkng depos of Custodian of Records of County of Los Angeles. Issd.
	16. Fld pltfs notc of tkng depos of Dr. Michael D. Rosco on 7-24-81. Issd.
7-13-81	17. Fld defts' exhibits to motn for S/J
	18. Fld defts aff of Peter A. Feige in suppt of motn for S/J
	19. Fld defts aff of Denis P. Hunady in suppt of motn for S/J
	20. Fld defts memo of P&As in suppt of defts' motn for S/J
	21. Fld defts aff of Robert Allison Johnson in suppt of motn for S/J
	22. Fld defts notc of motn & motn for S/J retnbl 8-17-81, 10AM
	LODGED defts prop findings of fact & conclus of law
	LODGED prop S/J
	23. Fld defts aff of Charles S. Dole in suppt of motn for S/J
7-23-81	24. Fld pltf's memo of P&A's in opp to defts' motn for S/J

DATE	PROCEEDINGS
	25. Fld pltf's aff in opp to defts' motn for S/J
	26. Fld pltf's aff of Michael D. Rosco, M.D. in opp to defts' motn for S/J
	27. Fld pltf's aff of Ronald L. Russell in op to defts' motn for S/J
	28. Fld pltf's statmnt of genuine issues
	29. Fld pltf's exhibits to op to motn for S/J (Vol. I)
	30. Fld pltf's exhibits to opp to motn for S/J (Vol. II)
	31. Fld pltf's exhibits to opp to motn for S/J (Vol. III)
7-28-81	32. Fld Stip & ORD (Kn) that motn for S/J be cont to 8-24-81, 10AM
7-30-81	33. Fld pltf's objectns to aff of Denis P. Hunady in suppt of motn for S/J
8-6-81	34. Fld pltf's proof of srvce by mail of objectns to aff of Denis P. Hunady in suppt of motn for S/J srvd Richard T. Davis Esq. on 8-5-81
8-10-81	35. Fld pltf's witness list
	36. Fld pltf's exhibit list
	37. Fld pltf's memo of contentions of fact & law
8-11-81	38. Fld pltf's applicatn & ORD (Kn) to shortn ti for notc of motn for leave to amend cmplnt GRANTED. Opp papers to be srvd on pltfs by 8-14-81
	39. Fld plft's memo of P&A's in suppt of pltf's motn for leave to amend cmplnt
	40. Fld pltf's aff of Brad N. Baker in suppt of motn for leave to amend cmplnt

DATE	PROCEEDINGS
8-11-81	41. Fld pltf's notc of motn & motn for leave to amend complnt retnbl 8-24-81, 10AM
8-14-81	42. Fld pltf's declaratn
	43. Fld defts' memo of P&A's in oppo to mot for lv to amnd
8-17-81	44. Fld defts' reply to pltf's oppo to mot for S/J
	45. Fld defts' memo of contentns of fact & law
	46. Fld defts' exh list
	47. Fld defts aff of R.T. Davis Jr; req for judicial ntc
	48. Fld defts' supplmt to reply to pltf's oppo to mot for S/J
	LODGED pltf's prop PTC ord
8-17-81	49. Fld defts' aff of R.T. Davis Jr., in oppo to mot for lv to amnd complt
8-19-81	LODGED cert copy of DEPOSITION of Doris M. Russel, tkn 2-26-81, volume I
	LODGED cert copy of DEPOSITION of Doris M. Russel, tkn 3-5-81, volume II
8-21-81	50. Fld pltf's aff
	51. Fld pltf's aff spptg filing of pltf's objs to defts' exhs
8-24-81	52. MIN ORD: PTC held; crt GRANTS deft's mot for S/J
8-24-81	53. Fld deft's Findgs of Fact & Conclusns of Law (R) (ENT 8-26-81) mld cys & ntcs.
	54. Fld ORD(R) that deft's mot for S/J is GRANTED & that pltf tk nothing by reason of claims in complt; complt is dism w/prej (ENT 8-26-81) mld cys & ntcs. MDJS-6

DATE	PROCEEDINGS
9/8/81	55. Fld pltf's/deft's BILL OF COSTS Retble 9/14/81 Taxed costs in sum of $1,710.85 against pltf
9/24/81	56. Fld pltf's NOTC OF APPEAL to 9th Cir C/A frm judgmt ent 8/26/81. $70.00 flng & docket fees pd.
10/2/81	57. Fld pltf proof of servic served notc of appeal on 9/29/81.
10-28-81	Fld orig reptr's transc of proc had on 8-24-81.
12/14/81	58. Fld pltf designation of clerk's recrd.
2/20/82	59. Fld defts
3-10-82	Paid & Fwd to C/A 1 cc of clk's rec on , along w/Orig reptr's transc of procdgs had on 8-24-81.
3-14-84	60. MO: Crt ORDS mandate frm USCA 9th Cir fld & sprd; costs awarded in amt of $940.50 for Doris Russell. (ENT 3-21-84) Mld cpys.
3/5/84	LODGED Order frm 9th Cir C/A Granting appellant's motn to filed a late bill of cost. Cost are taxed in amount of $940.50.
4-11-84	LODGED ord fr USCA denying pet for rehrng & to reject sug for rehrg en banc.
5-14-84	61. MIN ORD: Crt ORDS judgmt of USCA, 9th Cir. affirmng in prt & reversng in prt the jdmt fld & spread. Crt sets Stat conf fr 7-2-84 10:00am (ENT 5-17-84) MD JS-5
7-23-84	62. ORD stat confr contd to 8-20-84, 10AM MO
8-20-84	63. ORD matt contd to 10-15-84, 10AM MO
10-5-84	64. Status confer hearing contg to 11-5-84 fr hearing MO

[United States District Court for the Central District of California, Exhibit A to Affidavit of Robert Allison Johnson, filed in Support of Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, July 13, 1981]

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY EMPLOYEE SALARY CONTINUANCE PLAN

September 13, 1978

VOTED:

That the document attached hereto entitled Massachusetts Mutual Life Insurance Company Employee Salary Continuance Plan be ratified and approved for employees who were participants in the Plan as of December 31, 1977 and for employees who became participants on or after January 1, 1978.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY EMPLOYEE SALARY CONTINUANCE PLAN

Massachusetts Mutual Life Insurance Company (the Company), 1295 State Street, Springfield, Massachusetts 01111, is the Plan Sponsor of the Salary Continuance Plan. The Plan Year is January 1-December 31.

PURPOSE

The Employee Salary Continuance Plan provides for the continuation of salary payments for eligible employees who are absent from work because of sickness or accident.

ELIBILITY AND MEMBERSHIP

Persons become members of the Plan when employed as permanent employees of the Company in one of the following employment categories: full-time permanent, part-time permanent (Home Office) or reduced time permanent (Agency Field).

Membership is automatic upon being employed in an eligible category. Certificates of membership are not distributed for the Plan. Each employee is provided with a booklet describing the Plan.

Plan membership continues until the occurrence of one of the following events:

1. Termination of employment in an eligible category, or

2. Retirement. For this purpose "retirement" means:

(a) actual retirement from employment with the Company either (1) in accordance with the Massachusetts Mutual Employee Pension Plan, if applicable, including early retirement as allowed therein, or (2) on the first day of the month next following the Participant's date of termination of employment occurring on or after his 65th birthday, or (3) in the case of a retired employee who is re-employed after retirement, the date of his termination of employment; and

(b) disability which entitles the Participant to commence receiving benefits under the Massachusetts Mutual Employee Disability Plan.

PREVIOUS SERVICE

Previous service as an employee, or as a General Agent, or full-time agent of the Company will count toward accumulating salary continuance as follows:

1. Previous employment in an eligible category is counted if the employee returns to work within 30 days of separation from employment for any reason.

2. Service as a General Agent of the Company, or as an agent of the Company on a full-time basis, or as a salaried employee of a subsidiary corporation of which the Company owns 51% or more of the capital stock will be counted, provided such person became a permanent employee immediately after any period of such service.

3. Credit is given for full-time temporary service if such service is immediately prior to a transfer to full-time, reduced time, or Home Office part-time permanent status.

PLAN CONTRIBUTIONS

The Plan is non-contributory and all costs are paid by the Company.

BENEFITS

Payments of salary continuance benefits are made when an employee is absent from work because of illiness or injury. An employee will not receive salary continuance payments when the absence occurs for reasons other than illness or injury.

The amount of benefits depends on each employee's date of employment as defined under the Plan, the employee's length of service and the employee's sickness or accident record during the previous three years. The following salary continuance schedules apply. For employees who

were participants in the Plan as of December 31, 1977, and have been continuously employed since that date in an eligible category, benefits are determined from the following Schedule 1:

SALARY CONTINUANCE SCHEDULE I * **

(Employees Eligible as of December 31, 1977)

Sickness/Accident After Service for	Full Salary +	Two-Thirds Salary +	One-Third Salary
Less than 3 Months	0 Weeks	0 Weeks	0 Weeks
3 to 6 Months	0 Weeks	1 Week	1 Week
6 Months	1 Week	1 Week	1 Week
1 Year	2 Weeks	2 Weeks	2 Weeks
2 Years	4 Weeks	4 Weeks	4 Weeks
3 Years	6 Weeks	6 Weeks	6 Weeks
4 Years	8 Weeks	8 Weeks	8 Weeks
5 Years	10 Weeks	10 Weeks	10 Weeks
6 Years	12 Weeks	12 Weeks	12 Weeks
7 Years	14 Weeks	14 Weeks	11 Weeks
8 Years	16 Weeks	16 Weeks	10 Weeks
9 Years	18 Weeks	18 Weeks	9 Weeks
10 Years	22 Weeks	22 Weeks	8 Weeks
11 Years	24 Weeks	21 Weeks	7 Weeks
12 Years	26 Weeks	20 Weeks	6 Weeks
13 Years	28 Weeks	19 Weeks	5 Weeks
14 Years	30 Weeks	18 Weeks	4 Weeks
15 Years	32 Weeks	17 Weeks	3 Weeks
16 Years	34 Weeks	16 Weeks	2 Weeks
17 Years	36 Weeks	15 Weeks	1 Week
18 Years	38 Weeks	14 Weeks	0 Weeks
19 Years	40 Weeks	12 Weeks	0 Weeks
20 Years	42 Weeks	10 Weeks	0 Weeks
21 Years	44 Weeks	8 Weeks	0 Weeks
22 Years	46 Weeks	6 Weeks	0 Weeks
23 Years	48 Weeks	4 Weeks	0 Weeks
24 Years	50 Weeks	2 Weeks	0 Weeks
25 Years	52 Weeks	0 Weeks	0 Weeks
25+Years	52 Weeks	0 Weeks	0 Weeks

* Locate length on service in Column 1, then read across to determine the period and rate of salary continuance payments.

** Benefits on the Schedules are reduced by the total of all "Full Salary", "Two-Thirds Salary" and "One-Third Salary" benefits for sickness or accident absences during the previous three years, and by any applicable benefit reductions discussed below.

Employees who became participants on or after January 1, 1978, are eligible for benefits determined from the following Schedule II:

SALARY CONTINUANCE SCHEDULE II * **

(Employees Eligible on or After January 1, 1978)

-1- Sickness/Accident After Service for	-2- Full Salary	-3- Two-Thirds Salary
Less Than 6 Months	0 Weeks	0 Weeks
6 Months	0 Weeks	1 Week
1 Year	1 Week	2 Weeks
2 Years	2 Weeks	3 Weeks
3 Years	3 Weeks	4 Weeks
4 Years	4 Weeks	5 Weeks
5 Years	5 Weeks	6 Weeks
6 Years	6 Weeks	8 Weeks
7 Years	8 Weeks	10 Weeks
8 Years	10 Weeks	10 Weeks
9 Years	12 Weeks	10 Weeks
10 Years	14 Weeks	10 Weeks
11 Years	16 Weeks	10 Weeks
12 Years	18 Weeks	8 Weeks
13 Years	20 Weeks	6 Weeks
14 Years	22 Weeks	4 Weeks
15 Years	24 Weeks	2 Weeks
16 Years	26 Weeks	0 Weeks
16+ Years	26 Weeks	0 Weeks

* Locate length on service in Column 1, then read across to determine the period and rate of salary continuance payments.

** Benefits on the Schedules are reduced by the total of all "Full Salary" and "Two-Thirds Salary" benefits for sickness or accident absences during the previous three years, and by any applicable benefit reductions discussed below.

BENEFIT REDUCTIONS

1. *Workers' Compensation*

Employees eligible for payments for time lost from work under Workers' Compensation will receive those payments from the carrier of the Company's Workers' Compensation Insurance. If payments for lost time are less than the amount shown under the Salary Continuance Schedule, the Company will pay the difference between the amount payable under the Salary Continuance Schedule and the amount received under Workers' Compensation. If those payments are more than the amount shown on the Salary Continuance Schedule, the Company will not pay any benefits under the Plan.

2. *Social Security Disability Benefits*

For employees who qualify for benefits under the Social Security Disability insurance program, such Social Security benefits will affect payments made under the Plan according to the following schedule:

A. Full salary continuance pay will be reduced by the amount received from Social Security.

B. Two-thirds salary continuance pay will be reduced so that the total pay received from the Company Plan plus Social Security will not exceed 75% of normal pay.

C. One-third salary continuance pay, when applicable, will be reduced so that the total amount received from the Company Plan plus Social Security will not exceed 50% of normal pay.

3. *State Disability Benefits*

In states where the Company contributes under the state disability benefits law on behalf of its employees, the state disability benefits are integrated with the Com-

pany Plan benefits. This means that the Company will pay the amount determined by the Salary Continuance Schedule minus the amount payable under the state disability benefits law. In states where the employee alone contributes under the state disability benefits law, the state disability benefits and the Company Plan benefits are integrated to the extent that the employee does not receive more than 100% of normal pay.

CLAIM PROCEDURES

Special claim forms for salary continuance benefits are not necessary. Employees who are considered nonexempt under the Fair Labor Standards Act (FLSA) submit weekly time cards and salary continuance benefits are paid when it is indicated that there is an absence due to illness or injury. Exempt employees under the FLSA are paid salary continuance benefits when their monthly illness cards indicate absence due to illness or injury.

A doctor's verification of illness or injury is required if the absence continues for five or more consecutive working days. Benefits will not be paid where the required doctor's verification has not been provided.

If additional information is needed to process the claim, the employee will be provided with a listing of such additional information and the reason it is required for claim processing.

Claim denials will be furnished in writing stating the specific reasons for denial, the specific Plan provisions on which the denial is based, and an explanation of the review procedure. If an employee's claim is denied, such employee or the employee's authorized representative will have 60 days in which to appeal the decision to the Plan Administrator (see PLAN ADMINISTRATION section). The employee may also review any documents relating to the denial and submit in writing further information and comments. The Plan Administrator will make a final de-

cision on a review of the claim within 60 days. The Plan Administrator will give specific reasons and references to the Plan provisions on which the decision is based. The 60-day period may be extended for another 60 days if the Plan Administrator feels that special circumstances exist which require an extension of time.

PLAN ADMINISTRATION

The Payroll Section of the Employee Services Department in the Home Office is responsible for all administrative and recordkeeping duties as well as for the determination of benefits according to the Salary Continuance Schedules.

The Plan Administrator is: R. Allison Johnson, Senior Vice President, Corporate Personnel, Massachusetts Mutual Life Insurance Company, 1295 State Street, Springfield, Massachusetts 01111, Telephone No. (413) 788-8411.

Any communication regarding denial of benefits should be addressed to: Plan Administrator, Salary Continuance Plan, c/o Payroll Section, Employee Services Department, Massachusetts Mutual Life Insurance Company, 1295 State Street, Springfield, Massachusetts 01111.

The agent for legal process is: A. Peter Quinn, Jr., Executive Vice President and General Counsel, Massachusetts Mutual Life Insurance Company, 1295 State Street, Springfield, Massachusetts 01111, or the Plan Administrator.

All other communications should be sent as follows:

For Life Agency Employees	For All Other Employees
Agency Financial Administration Department Massachusetts Mutual Life Insurance Company 1295 State Street Springfield, MA 01111	Payroll Section Employee Services Department Massachusetts Mutual Life Insurance Company 1295 State Street Springfield, MA 01111

FUNDING POLICY

The Funding Policy of this Plan is to provide for the payment of benefits with funds taken from the general assets of the Company

AMENDMENT AND TERMINATION

The Plan may be amended or terminated at any time by a duly adopted resolution of the Board of Directors of the Company.

[United States District Court for the Central District of California, Exhibit B to Affidavit of Robert Allison Johson, filed in Support of Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, July 13, 1981]

EMPLOYEE SALARY CONTINUANCE PLAN

an employee handbook, January 1, 1978

This handbook is designed to explain to you the highlights of the Salary Continuance Plan. This description is not part of the Plan and does not modify it or serve as a conclusive interpretation of its terms. It merely outlines circumstances applicable to most participants and does not cover less usual situations. If you have any questions, contact (a) for Life Agency Office employees—the Agency Financial Administration Department or (b) for all other employees—the Payroll Section, Employee Services Department, Home Office.

Plan Sponsor: Massachusetts Mutual Life Insurance Company
1295 State Street
Springfield, Massachusetts 01111

Employer Identification Number: 04-1590850

Plan Number: 504

Plan Year: January 1—December 31

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MASSACHUSETTS MUTUAL EMPLOYEE SALARY CONTINUANCE PLAN

I. INTRODUCTION

The Employee Salary Continuance Plan provides for the continuation of salary payments for eligible employees who are absent from work because of sickness or accident. It is a most valuable employee benefit provided at no cost to members.

II. ELIGIBILITY AND MEMBERSHIP

How do I become a member of the plan?

You automatically become a member when you become employed as a permanent employee of the Massachusetts Mutual Life Insurance Company (the Company) in one of the following employment categories; full-time permanent, part-time permanent (Home Office) or reduced time permanent (Agency Field).

How will I know I am a member?

Upon being employed in an eligible category, you *automatically* become a member of the Plan. Certificates of membership are *not* distributed for this Plan.

Do I have to pay anything for Plan membership?

No. The Plan is non-contributory and all costs are paid by the Company.

How long will I remain a member?

You will be a member of the Plan until:

1. You terminate employment in an eligible category, or
2. You retire under the Massachusetts Mutual Employee Pension Plan, or
3. You retire under the Massachusetts Mutual Employee Disability Plan.

Amendment or Termination of Plan

While it is the Company's intention to keep this Plan in effect, the Company retains the right to amend or to terminate the Plan at any time at its election.

III. BENEFITS AND CLAIM PROCEDURES

When am I eligible for benefits?

You are eligible for salary continuance benefits when you are absent from work because of illness or injury. You are not eligible for salary continuance benefits when you are absent for any other reasons.

How do I apply for benefits?

Special claim forms for salary continuance benefits are not necessary. If you are considered a non-exempt employee under the Fair Labor Standards Act (FLSA), (i.e., clerical and non-titled employees) you submit weekly time cards and salary continuance benefits are paid when you indicate an absence due to illness or injury. If you are considered an exempt employee under the FLSA (titled employee), you are paid salary continuance benefits when the monthly illness cards that you submit indicate absence due to illness or injury.

Do I need a doctor's verification of illness to receive benefits?

A doctor's verification is required if you have been absent because of illness or injury for 5 or more consecutive working days. Benefits will not be payable where the required doctor's verification has not been provided.

What if I am refused benefits?

If your claim is denied, you will be furnished in writing:

- the specific reasons for denial
- the specific plan provision on which the denial is based

- a description of and reason for needing additional information to consider the claim, and
- an explanation of the review procedure

What if I disagree with the reasons for denying my claim?

If your claim is denied, you or your authorized representative will have 60 days in which to appeal the decision to the Plan Administrator (see Section V). You may also review any documents relating to the denial and submit in writing further information and comments.

The Plan administrator will make a final decision on a review of your claim within 60 days. He will give specific reasons and references to the plan provision on which his decision was based. The 60 days may be extended for another 60 days if the Plan Administrator feels that special circumstances exist which require an extension of time.

What will my benefits be?

The amount of benefits depends on your date of employment as defined under this plan, your length of service, and your sickness record during the previous three years.

If you were a participant in the Plan as of *December 31, 1977*, and have been continuously employed since then in an eligible category, your benefits are determined from the following Schedule I.

SALARY CONTINUANCE SCHEDULE I

Sickness/Accident After Service for	Full Salary	Two-Thirds Salary	One-Third Salary
Less Than 3 Months	0 Weeks	0 Weeks	0 Weeks
3 to 6 Months	0 Weeks	1 Week	1 Week
6 Months	1 Week	1 Week	1 Week
1 Year	2 Weeks	2 Weeks	2 Weeks
2 Years	4 Weeks	4 Weeks	4 Weeks
3 Years	6 Weeks	6 Weeks	6 Weeks
4 Years	8 Weeks	8 Weeks	8 Weeks
5 Years	10 Weeks	10 Weeks	10 Weeks
6 Years	12 Weeks	12 Weeks	12 Weeks
7 Years	14 Weeks	14 Weeks	11 Weeks
8 Years	16 Weeks	16 Weeks	10 Weeks
9 Years	18 Weeks	18 Weeks	9 Weeks
10 Years	22 Weeks	22 Weeks	8 Weeks
11 Years	24 Weeks	21 Weeks	7 Weeks
12 Years	26 Weeks	20 Weeks	6 Weeks
13 Years	28 Weeks	19 Weeks	5 Weeks
14 Years	30 Weeks	18 Weeks	4 Weeks
15 Years	32 Weeks	17 Weeks	3 Weeks
16 Years	34 Weeks	16 Weeks	2 Weeks
17 Years	36 Weeks	15 Weeks	1 Week
18 Years	38 Weeks	14 Weeks	0 Weeks
19 Years	40 Weeks	12 Weeks	0 Weeks
20 Years	42 Weeks	10 Weeks	0 Weeks
21 Years	44 Weeks	8 Weeks	0 Weeks
22 Years	46 Weeks	6 Weeks	0 Weeks
23 Years	48 Weeks	4 Weeks	0 Weeks
24 Years	50 Weeks	2 Weeks	0 Weeks
25 Years	52 Weeks	0 Weeks	0 Weeks

If you became a participant on or after *January 1, 1978*, your benefits are determined from the following Schedule II.

SALARY CONTINUANCE SCHEDULE II

Sickness/Accident After Service for	Full Salary	Two-Thirds Salary
Less Than 6 Months	0 Weeks	0 Weeks
6 Months	0 Weeks	1 Week
1 Year	1 Week	2 Weeks
2 Years	2 Weeks	3 Weeks
3 Years	3 Weeks	4 Weeks
4 Years	4 Weeks	5 Weeks
5 Years	5 Weeks	6 Weeks
6 Years	6 Weeks	8 Weeks
7 Years	8 Weeks	10 Weeks
8 Years	10 Weeks	10 Weeks
9 Years	12 Weeks	10 Weeks
10 Years	14 Weeks	10 Weeks
11 Years	16 Weeks	10 Weeks
12 Years	18 Weeks	8 Weeks
13 Years	20 Weeks	6 Weeks
14 Years	22 Weeks	4 Weeks
15 Years	24 Weeks	2 Weeks
16 Years	26 Weeks	0 Weeks
16+Years	26 Weeks	0 Weeks

Please note that benefits under both schedules are reduced by the total of all sickness absences during the previous three years.

Here's an example of how it works:

Employee Jack Jones started as a permanent employee on June 1, 1976. On January 27, 1977 he came down with an illness causing him to be absent from work for 5 days. This was his first illness while employed at Mass Mutual. Under Salary Continuance Schedule I, (6 months of service) he received *full* pay for the entire 5 day period of absence.

It was not until August 10, 1977 that Jack was again absent due to illness. As a result of surgery, Jack was absent from work for 15 working days. According to Salary Continuance Schedule I, Jack, with 1 year of

service, was entitled to 2 weeks (10 days) at full pay, 2 weeks (10 days) at two-thirds pay, and 2 weeks (10 days) at one-third pay. However, since he had used 5 days of *full* sick pay within the past three year period, he would now receive 5 days of this absence at *full* pay and the remaining 10 days would be at *two-thirds* pay.

Does previous service as an employee or as a General Agent or full-time agent of the Company count toward accumulating salary continuance?

1. Previous employment in an eligible category is counted if you return to work within 30 days of separation.

2. Service as a General Agent of the Company or as an agent of the Company on a full-time basis or as a salaried employee of a subsidiary corporation of which the Company owns 51% or more of the capital stock will be counted provided you become a permanent employee immediately after any period of such service.

3. Credit is given for full-time temporary service if such service is immediately prior to transfer to full-time, reduced time or Home Office part-time permanent status.

IV. BENEFIT REDUCTIONS

If I receive benefits from another source, how will they affect my Massachusetts Mutual salary continuance payments?

1. Worker's Compensation

   If you are eligible for payments for time lost from work under Worker's Compensation, you will receive those payments from the carrier of our worker's compensation insurance. If those payments are less than the amount shown under the salary continuance

schedule, the Company will pay the difference between the amount payable under the salary continuance schedule and the amount received under worker's compensation. If those payments are more than the amount shown on the salary continuance schedule, the Company will not pay you any benefit under the Plan.

2. Social Security Disability Benefits

If you qualify for benefits under the Social Security disability insurance program, such payments will affect payments made under the Company's salary continuance program according to the following schedule:

a. Full salary continuance pay will be reduced by the amount received from Social Security.

b. Two-thirds salary continuance pay will be reduced so that the total pay received from the Massachusetts Mutual salary continuance program plus Social Security will not exceed 75% of normal pay.

c. One-third salary continuance pay, when applicable, will be reduced so that the total pay received from the Massachusetts Mutual salary continuance program plus Social Security will not exceed 50% of normal pay.

3. State Disability Benefits

In states where the Massachusetts Mutual pays a share of the DISABILITY TAX (New York, New Jersey, Hawaii), the STATE DISABILITY BENEFITS are integrated with the MASSACHUSETTS MUTUAL SALARY CONTINUANCE BENEFITS payable. This means that the Company will pay you the amount determined by the Salary Continuance Schedule less the amount payable under State Disability Benefits.

In states where the employee pays the entire DISABILITY TAX (California), the STATE DISABILITY BENEFITS and the MASSACHUSETTS MUTUAL SALARY CONTINUANCE BENEFITS are integrated only so that the employee does not receive more than 100% of regular pay.

V. PLAN ADMINISTRATION AND PARTICIPANT'S RIGHTS

Who's in charge?

The Payroll Section of the Employee Services Department in the Home Office is responsible for all administrative and record keeping duties as well as for the determination of benefits according to the SALARY CONTINUANCE SCHEDULE. Benefits are disbursed directly from general assets of the Company.

Plan Administrator: R. Allison Johnson,
Senior Vice President
Corporate Personnel
Massachusetts Mutual
Life Insurance Co.
1295 State Street
Springfield, MA 01111
Tel. No. 413-788-8411

To whom do I write if I have a question or complaint?

Any communication regarding denial of benefits should be addressed to:

Plan Administrator, Salary Continuance Plan
c/o Payroll Section
Employee Services Department
Massachusetts Mutual Life Insurance Company
1295 State Street
Springfield, MA 01111

The agent for legal process is:

A. Peter Quinn, Executive Vice President
and General Counsel
Massachusetts Mutual Life Insurance Company
1295 State Street
Springfield, MA 01111,

(or the Plan Administrator)

All other communications should be sent to:

(for Life Agency Employees)

Agency Financial Administration Department
Massachusetts Mutual Life Insurance Company
1295 State Street
Springfield, MA 01111

(for all other employees)

Payroll Section
Employee Services Department
Massachusetts Mutual Life Insurance Company
1295 State Street
Springfield, MA 01111

What other rights do I have under the plan?

As a participant, you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

1. Examine, without charge, at the Plan Administrator's office and at other worksites, all plan documents, including insurance contracts and copies of all documents filed by the plan with U.S. Department of Labor, such as detailed annual reports and plan descriptions.

2. Obtain copies of all plan documents and other plan information upon written request to the Plan Administrator. The administrator may make a reasonable charge for the copies.

In addition to creating rights for plan participants, ERISA imposes duties upon the people who are responsible for the operation of the employee benefit plan. The people who operate your plan, called "fiduciaries" of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries. No one, including your employer or any other person, may fire you or otherwise descriminate against you in any way to prevent you from obtaining a welfare benefit or exercising your rights under ERISA. If your claim for a welfare benefit is denied in whole or in part you must receive a written explanation of the reason for the denial. You have the right to have the plan review and reconsider your claim. Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the plan and do not receive them within 30 days, you may file suit in a federal court. In such a case, the court may require the plan administrator to provide the materials and pay you up to $100 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the administrator. If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court.. If it should happen that plan fiduciaries misuse the plan's money, or if you are discriminated against for asserting your rights you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court. The court will decide who should pay court costs and legal fees. If you are successful the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous. If you have any questions about your plan, you should contact the Plan Administrator. If you have any questions about this statement or about your rights under ERISA, you should contact the nearest Area Office of the U.S. Labor-Management Services Administration Department of Labor.

[United States District Court for the Central District of California, Exhibit C to Affidavit of Robert Allison Johnson, filed in support of Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, July 13, 1981]

MASSACHUSETTS MUTUAL EMPLOYEE DISABILITY PLAN

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a mutual life insurance company organized under the laws of the Commonwealth of Massachusetts and having its Home Office in Springfield, Massachusetts, does hereby establish, effective August 1, 1976, in accordance with the resolution of its Board of Directors, a disability income plan for the benefit of its employees, as hereinafter provided, under the provisions of Section 36 of Chapter 175 of the General Laws of Massachusetts as amended. This plan replaces the Massachusetts Mutual Employee Disability Plan which was established October 22, 1952. This plan applies only to employees who are actively at work and who meet the requirements for Membership on the effective date or at any time thereafter. Any employee who is absent from work and disabled or receiving salary continuance on August 1, 1976, will continue to be covered under the provisions of the Massachusetts Mutual Employee Disability Plan effective October 22, 1952, as revised prior to August 1, 1976, and will be covered under this plan only upon return to active employment on a full-time basis.

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ARTICLE I

Name

I. The disability plan shall be designated "Massachusetts Mutual Employee Disability Plan" and is hereinafter referred to as the "Disability Plan" which reference shall include the provisions hereof and all amendments and modifications thereof.

ARTICLE II

Definitions

II. A. The following words and terms as used in this Disability Plan shall have the meanings set forth below:

1. Administrator: The Plan Administrator provided for in Article X.
2. Armed Forces: The Armed Forces, Coast Guard or the Merchant Marine of the United States.
3. Chief Personnel Officer: Executive officer in charge of the corporate personnel division of the Company.
4. Company: Massachusetts Mutual Life Insurance Company
5. Compensation: "Compensation," for employees other than employees in the Company's Group Field Offices whose compensation is related, in part, to the sale of the Company's group products, means the amount payable by the Company to a Participant at the Participant's basic rate of salary or wages for services rendered during each payroll period, without reduction for any authorized absence, but does not include payments for shift differential, overtime, and bonuses. For employees in the Company's Group Field Offices whose compensation is related, in part, to the sale

of the Company's group products, 'compensation' means the gross amount of base salary and additional salary plus, if any, the salary portion of the new productions bonus, to the extent such amounts qualify as salary for purposes of such employee's participation under the Massachusetts Mutual Employee Pension Plan.

6. Effective Date: August 1, 1976
7. Employee: Any person, including any officer, who is actively engaged as a full-time, permanent, salaried employee of the Company, with the exception of any Field Assistant.
8. Member: Any employee who has qualified as a Member under the Disability Plan as provided in Article III and whose membership has not terminated as provided in Article IV.

II. B. Whenever any words are used herein in the masculine they may be read and construed in the feminine where they would so apply and words used in the singular may be read and construed in the plural where they would so apply.

ARTICLE III

Eligibility for Membership

III. A. All present and future employees of the Company shall become Members of the Disability Plan on whichever of the following is earlier: (1) completion of two years of continuous employment as an employee of the Company or (2) attainment of age 25 and completion of one year of continuous employment as an employee of the Company.

III. B. In determining continuous employment as an employee of the Company there shall be included the period an employee was a member of the Armed Forces, provided such person returns as an employee of the Company not later than 90 days after his discharge as an

active member of such Armed Forces, but there shall be excluded any period an employee was absent from employment by reason of illness if the period of absence was in excess of 30 days in any one year of employment, whether consecutive or otherwise.

III. C. Any period of service as a General Agent of the Company or an agent of the Company on a full-time basis under contract with the Company or with a General Agent of the Company, or both, or employment as a salaried employee of a subsidiary corporation of which the Company owns 51% or more of the capital stock shall be included in determining continuous employment as an employee of the Company.

ARTICLE IV

Duration of Membership

IV. After an employee becomes a Member of the Disability Plan, his membership shall continue until whichever of the following events shall first occur:

(a) retirement under the Massachusetts Mutual Employee Pension Plan, or

(b) termination of employment as an employee of the Company other than by reason of disability within the provisions hereof.

ARTICLE V

Company Contribution

V. The Company shall annually contribute such amount as may be required to establish and maintain the actuarial reserve liabilities under the Disability Plan.

ARTICLE VI

Disability Benefits

VI. A. *Entitlement and Amount.* If the Company shall receive at its Home Office due proof that a Member has

become totally disabled so that he is wholly prevented thereby from performing substantially all of the duties of his usual occupation during the first two years of such total disability, and thereafter from performing any work or engaging in any business or occupation for compensation or profit, the Company will pay such Member monthly disability benefits for the period of disablement but excluding the first eight weeks after the date on which the Member becomes totally disabled. Payment of benefits will commence on the first day of the month next succeeding receipt of due proof of disability. The amount of each monthly benefit payment will be equal to 1/12 of the annual benefit as computed from the following table for the annual rate of compensation of such Member of the day prior to the commencement of disability hereunder.

COMPENSATION	ANNUAL BENEFIT
to $3,000	85% of compensation
$3,000 to $6,000 inclusive	$2,550 plus 70% of compensation in excess of $3,000
$6,000 to $10,00 inclusive	$4,650 plus 60% of compensation in excess of $6,000
$10,000 to $20,000 inclusive	$7,050 plus 50% of compensation in excess of $10,000
$20,000 to $50,000 inclusive	$12,050 plus 45% of compensation in excess of $20,000
over $50,000	$25,550 plus 40% of compensation in excess of $50,000

Maximum Annual Benefit $60,000

VI. B. *Benefit Offset.* Any disability benefits payable in accordance with the above schedule shall be reduced by the sum of any income or benefit payable on account of the employee's disability under one or more of the following:

(1) Any Workmen's Compensation Law, Employees' Disability Law or any other similar law or act;

(2) Any salary continuance plan or similar type of plan established by the Company, whether or not

established in compliance with an applicable state or federal law or act;

(3) The Federal Old Age, Survivors and Disability Insurance Act (Social Security), provided that the determination of the amount payable thereunder during any one period of disability shall be without regard to any increase in benefits thereunder after benefit payments under the Plan have commenced. Benefits payable under said Act to the employee's spouse or children on account of the employee's disability or his attainment of a specified age, shall not be included in the benefit offset determination.

A disabled employee must submit to the Company within five months from the commencement of his disability, satisfactory proof that he has applied for Social Security disability benefits, and must agree to reimburse the Company, if approved for Social Security disability benefits, the amounts which would be a proper offset under the preceding paragraph. In the event a disabled employee does not furnish such satisfactory proof, and an agreement to reimburse disability benefits payable under the Plan will be reduced by the amounts which the Company determines would be the Social Security disability benefit offset under the preceding paragraph assuming an application for such benefits had been made and approved;

(4) Any disability benefit payable by the United States or any other country or international authority in connection with a disability which any Member received or contracted while in the Armed Forces and such disability occurs after the expiration of two years from the date of his employment or re-employment as an employee of the Company; and

(5) Any coverage required or provided by any statute (including, but not limited to, any National or State No-Fault Motor Vehicle Insurance Act)

VI. C. *Rehabilitation.* If, while totally disabled as defined in Article VI.A, a Member engages in any occupation, business, employment or profession, his earnings therefrom shall be added to and become a part of the benefit offset applicable in determining the amount of any monthly benefit payment due the Member; provided, however, that if, while receiving disability benefits hereunder, a Member engages in any occupation, business, employment or profession which, as determined by the Company, appears to be rehabilitative in nature, the Company may, notwithstanding any other provision of this Disability Plan, specify a period of time, not exceeding twenty-four months nor extending beyond the Member's sixty-fifth birthday, during which not more than 50% of the Member's earnings will be offset against the monthly amount of disability benefits otherwise payable.

VI. D. *Maximum Benefit.* The amount of disability benefits paid under this Disability Plan will be limited, however, so that the total monthly amount received by the disabled Member, including the benefits payable under this Disability Plan, the Social Security Act, and any Workmen's Compensation Act and earnings of the disabled Member from other employment, will not exceed 90% of the monthly cash compensation received by the disabled Member from the Company immediately prior to the date benefit payments commenced under this Disability Plan.

A totally disabled Member's acceptance of any monthly disability benefits in an amount determined by including part of his earnings from an occupation, business, employment or profession shall not prejudice the right of the Member to receive monthly disability benefits in an amount determined without reference to such earnings

should the Member remain totally disabled beyond the cessation of such earnings.

VI. E. *Duration of Payments.* Disability benefits as provided in this Article shall be payable only as long as such Member shall be totally disabled as herein defined, but in no event beyond the date of the retirement of the Member under the Massachusetts Mutual Employee Pension Plan or age 65 if not a participant in the Massachusetts Mutual Employee Pension Plan.

VI. F. *Conditions Precluding Benefits under this Plan.* No disability benefits herein provided shall be due or payable to a Member if total disability results directly or indirectly from:

(1) Intentional self-inflicted injury, or

(2) Pregnancy, except complications of pregnancy, or

(3) Bodily injury, mental illness or disease of any kind received or contracted while in the Armed Forces, and such disability occurs within two years from the date of his employment or reemployment as a Member of the Company.

VI. G. *Conditions Existing at time of Employment.* If the employee received medical care or treatment due to an accidental bodily injury or disease during the 12 consecutive months immediately preceding the effective date of the employee's participation in the Plan, no benefits will be payable with respect to any period of total disability that commences within the 24 month period immediately following said effective date of participation that is the result of, or related to, the injury or disease, unless such disability commences subsequent to a period of 12 consecutive months ending after the effective date of participation and during which the employee has received no medical care or treatment for the injury or disease. This provision shall be effective only as to those

individuals who commence employment with the Company on or after November 1, 1976.

VI. H. *Proof of Disability.* The Member shall furnish as often as the Company reasonably may request due proof of the continuance of such disability, and at the request of the Company shall submit to physical examinations or laboratory tests by physicians designated by the Company. If the Member shall (1) fail to furnish such proof of disability, or (2) refuse to submit to such examination or other tests, or (3) become able to perform any work or engage in any business or occupation for compensation or profit, other than that deemed rehabilitative as provided in Article VI.C, any monthly disability benefits herein provided shall immediately cease.

ARTICLE VII

Reemployment

VII. A. Except as provided in Paragraphs B and C of this Article, the reemployment of any person as an employee of the Company shall be deemed to be a first employment for the purposes of the Disability Plan and he shall become a Member of the Disability Plan when he has complied with the provisions of Article III above.

VII. B. A former Member who returns as an employee of the Company not later than 90 days after his discharge as an active member of the Armed Forces shall become a Member of the Disability Plan on the date of his reemployment.

VII. C. A Member who returns as an employee of the Company directly following a period during which he or she has been receiving benefits under the Massachusetts Mutual Employee Disability Plan shall continue to be a Member of the Plan.

ARTICLE VIII

Liability for Payments

VIII. All payments provided by the Disability Plan shall be a liability of the Company and shall have the same status as policy guarantees and claims. Funds of the Disability Plan shall be held by the Company in a liability fund entitled "Reserve for Massachusetts Mutual Employee Disability Plan" and there shall be no obligation to segregate the funds of the Disability Plan from the other assets of the Company. All payments shall be due and payable at the Home Office of the Company in Springfield, Massachusetts.

ARTICLE IX

Funding of Benefits

IX. The reserves to be established and maintained for the benefits provided under the Disability Plan shall be determined on the basis of assumptions approved by the Chief Actuary of the Company but shall not be less than the minimum reserve required or permitted by the Commissioner of Insurance of the Commonwealth of Massachusetts. Each year the Company shall transfer from the general funds of the Company to the reserve liability of the Disability Plan such amount as the Chief Actuary of the Company may determine to be necessary to adequately fund the Disability Plan.

ARTICLE X

Plan Administration

X. A. The Chief Executive Officer of the Company may appoint an Administrative Committee and shall appoint a Plan Administrator. The Chief Personnel Officer may be the Administrator of the Plan. The Plan Administrator shall be the Chairman of any Administrative Committee which the Chief Executive Officer may appoint. Any appointee must be an employee of the Company.

X. B. The Administrator shall perform all acts required of the Administrator by this Plan, and by any applicable law, subject to the permitted delegations and the allocation of functions set forth within this Plan, and subject to the supervision and direction of any Administrative Committee.

The Administrative Committee, if appointed, shall regularly review, supervise and direct the operation of the Plan. The action of the Committee on all matters shall be by majority vote of its members. The Committee may through resolution authorize one or more members to execute instruments in its behalf and any instrument executed by such authorized person or persons shall, as to the Plan members, constitute the authorized act of the Committee. The Committee shall appoint a Secretary, who may or may not be a member of the Committee, who shall keep the records of the Committee's actions and proceedings.

X. C. The Administrator, the Committee, and any person exercising a fiduciary function under the Plan may engage the assistance of and rely on opinions from the auditors, accountants, and legal counsel of the Company and others in conjunction with the performance of functions hereunder.

X. D. Subject to the powers of the Administrator and any Administrative Committee appointed hereunder, the Company's Chief Personnel Officer and persons under his supervision shall be responsible for and shall perform all administrative and recordkeeping duties contemplated by the Plan involving payment of disability benefits and communications with Plan members.

X. E. The Chief Personnel Officer shall provide a Member with a written statement as to the reasons for any denial of benefits hereunder and shall inform him of his right to a full and fair review by the Administrator, or, if appointed, the Administrative Committee. Any mem-

ber may direct any grievance with respect to the denial of benefits to the Administrator or Administrative Committee which shall review such grievance. The Administrator or Administrative Committee shall consider such material as may be presented by an aggrieved person or his representative. The decision of the Administrator or Administrative Committee with respect to the grievance shall be communicated in writing to the aggrieved person. No appeal of a denial of benefits will be permitted hereunder unless the Administrator receives written notice of the appeal not later than 60 days from the date the Member receives written notice of the denial of benefits.

X. F. The term of office of the Administrator and of each member of any Administrative Committee shall be until death, termination of employment, retirement, removal or resignation. In the event of the termination of office of any member of the Administrative Committee, the remaining members shall act until a successor has been appointed. The Chief Executive Officer shall have the right to remove from office the Administrator or any member of the Administrative Committee. Resignation shall be effective by written notice mailed or delivered to the Chief Executive Officer or the Company.

X. G. The Administrator and any Administrative Committee shall be fully protected in taking any action based on any paper or document believed to be genuine or valid and to be properly executed and presented. All decisions, actions or failures to act on the part of the Administrator or any Administrative Committee or any member thereof made or taken in good faith in order to carry out the intent and purpose of the Plan shall discharge such person from liability. No provision of this Plan shall be construed, applied or interpreted to relieve any person of liability for fraud, misfeasance, willful neglect, or breach of fiduciary duty. The Administrator, any Administrative Committee and members thereof, or any person having authority with respect to the Plan shall not

be charged with any liability in the event of the invalidity of the Plan or any part thereof or by reason of the failure of the Plan to provide benefits or to carry out its intent and purposes with respect to any member.

ARTICLE XI

Amendment, Modification, Suspension or Discontinuance

XI. While it is intended that this Plan shall be established and continued for an indefinite period, the Company nevertheless reserves the right without the consent of any person, through action of its Board of Directors, to amend, modify, suspend or discontinue the Disability Plan. No such action shall adversely affect the rights of any Member who is then receiving disability benefits under the Disability Plan. If the Disability Plan is discontinued, no employee of the Company shall have the right on and after the date of discontinuance to become a Member of the Disability Plan.

ARTICLE XII

Liability of Officers and Directors of the Company

XII. Except as otherwise required or permitted by Section 410(a) of the Employee Retirement Income Security Act of 1974, as amended, no recourse under any provision of this Plan shall be had against any officer or director of the Company as such, past, present or future, and all such officers and directors are hereby released from all liability hereunder as a condition of, and as part of the consideration for, the execution hereof and the assumption of the obligations hereunder by the Company and the participation in benefits hereunder by Members.

ARTICLE XIII

Nonassignability

XIII. No Member may anticipate, encumber, alienate or assign any of his rights, claims or interest in the Disability Plan and, to the extent permitted by the laws of the place of residence of the Member, no payment, benefit or right arising by reason of the Disability Plan shall be in any way subject to the debts, contracts, or engagements of any Member or legal process of any kind.

ARTICLE XIV

Inspection of Plan

XIV. There shall be kept on file with the Company a true copy of the Disability Plan, of all amendments or modifications thereto, of the resolutions of the Board of Directors authorizing the Disability Plan and any amendments or modifications, and all other documents required to be maintained and subject to inspection under the requirements of the Employee Retirement Income Security Act of 1974. All employees of the Company shall have the right to inspect such copies during the business hours of the Company. Each Member shall have a similar right to inspect the records of the Disability Plan which relate to his own interest therein but shall have no right to inspect the records of the Disability Plan relating to the interest or membership of others.

ARTICLE XV

Notices and Addresses

XV. A. For all purposes of the Plan the following addresses shall govern:

Administrator or Administrative Committee	Administrator of Employee Disability Plan c/o Massachusetts Mutual Life Insurance Company 1295 State Street Springfield, Massachusetts 01111
Company	Massachusetts Mutual Life Insurance Company 1295 State Street Springfield, Massachusetts 01111

The addresses of all members shall be the last address of such person on file with the Company or Administrator.

XV. B. Notification to the Employees at the Home Office of the Company in Springfield, Massachusetts shall be through the medium of the customary interoffice communication system unless an employee shall request that notice be sent to a different address by filing a written request therefor with the Administrator. Notification to employees who are not employed at the Home Office in Springfield, Massachusetts shall be in care of the office or agency of the Company in which they are employed by the Company unless such employee shall request that notice be sent to a different address by filing a written request therefor with the Administrator.

ARTICLE XVI

Miscellaneous Provisions

XVI. A. Membership in the Disability Plan shall not be construed to alter, modify or change the relationship of employer and employee or to grant to any employee the right to be retained in the employ of the Company or to modify the authority of the Company over its employees.

XVI. B Facility of Payment. Whenever in the sole and exclusive judgment of the Company a Member is deemed to be physically or mentally incompetent to receive and give a valid receipt for payment due hereunder and no guardian, committee or other legal representative of the property of such Member is then qualified to act, any

monthly payment due such Member may be paid to the wife or husband of the Member or to any other person or institution appearing in the sole and exclusive judgment of the Company to be equitably entitled to such payment by reason of having incurred expense for the care and maintenance of such Member, and the Company's cancelled check for any such payment made to such wife or husband or such person or institution shall be conclusive evidence that all claims for such monthly payment under the Disability Plan have been fully satisfied and shall constitute a discharge of liability under the Disability Plan for such monthly payment.

XVI. C. The validity of the Disability Plan and of any of its provisions, amendments and modifications and the rights of all persons thereunder shall be determined and construed under and in accordance with the laws of the Commonwealth of Massachusetts.

[United States District Court for the Central District of California, Exhibit D to Affidavit of Robert Allison Johnson, filed in support of Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, July 13, 1981]

YOUR LONG-TERM DISABILITY PLAN

an employee handbook

This booklet is designed to explain to you the highlights of this plan. The description is not part of the plan and does not modify it or serve as a conclusive interpretation of its terms. The description outlines circumstances applicable to most participants and does not cover less usual situations. If you have any questions, contact the Employee Benefits Section of the Personnel Department.

Plan Sponsor: Massachusetts Mutual Life
Insurance Company
1295 State Street
Springfield, Massachusetts 01111

Employer Identification Number: 04-1590850

Plan Number: 501.

Plan Year: January 1—December 31

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MASSACHUSETTS MUTUAL EMPLOYEE DISABILITY PLAN

I. INTRODUCTION

The Employee Disability Plan provides monthly income to participating full-time employees who become totally disabled beyond the period covered by Salary Continuance benefits.

II. ELIGIBILITY

How do I become a member of the plan?

You automatically become a member if you were actively employed on August 1, 1976, or after and have been a full-time permanent employee for either

- one year of *continuous* service if you are at least age 25, or
- two years of *continuous* service if you are less an age 25.

Individuals receiving disability benefits continuously since before August 1, 1976, are covered by the plan as it existed prior to that date.

What is meant by "continuous" service?

1. Service starting on your date of employment as a *full-time permanent employee* will be considered as continuous, except that absences of 30 days or more will not be counted.
2. Any period you were a member of the *Armed Forces*, provided you return as an employee not later than 90 days after your discharge as an active member of the Armed Forces, will be considered as continuous service.
3. Any period of employment as a *General Agent* of the Company or an *agent* of the Company on a full-time basis under contract or as a salaried *employee of a subsidiary* corporation of which the Company owns 51% or more of the capital stock will be considered as continuous service providing you become a full-time permanent employee immediately after any period of such service.

III. MEMBERSHIP

How will I know I am a member?

Upon completion of the service requirements you will be enrolled in the Plan and will receive a certificate of membership as well as a copy of this handbook. If you think you satisfy the eligibility requirements and have not received a certificate, contact the Employee Benefits Section of the Personnel Department

Do I have to pay anything for Plan Membership?

No. The Plan is non-contributory and all costs are paid by the Company.

How long will I remain a member?

You will be a member of the Plan until:

1. You retire under the Massachusetts Mutual Employee Pension Plan or,
2. You terminate employment other than by reason of disability or,
3. You attain age 65.

IV. DISABILITY BENEFITS

When am I eligible for benefits?

You are eligible if the Company determines that you have been totally disabled for a period of at least eight weeks due to illness or injury and have exhausted your Salary Continuance allowance. You will be considered

totally disabled if you are *wholly prevented from performing substantially all of your usual occupation* during the *first two years* of disability, and *thereafter* from performing *any work* or engaging in any business or occupation for compensation or profit.

How do I apply for benefits?

Application for benefits may be made when you feel you fulfill the previously mentioned definition. However, *no benefits* will be *paid until at least eight weeks* after the date on which total disability commenced.

You may request claim application forms from the Employee Benefits Section of the Personnel Department. With the claim forms you will receive instructions for completion and mailing back to the Home Office.

How is a claim processed?

Claims are reviewed by the Company's Disability Committee. This Committee may ask for additional medical information or studies before deciding to recommend approval or denial of the claim. The Administrative Committee (see Section VIII) makes the final determination concerning your claim; you will be notified as soon as a decision is reached. If your claim is denied, you will have 60 days in which to appeal the decision in writing to the Plan Administrator (see Section VIII). You may also review any documents relating to the denial and submit in writing further information and comments.

If approved, what will my benefits be?

You will be paid monthly, beginning on the first day of the month following approval, according to the following schedule:

Annual Compensation	Annual Benefit
To $6,000	$2,550 plus 70% of compensation in excess of $3,000
$6,001 to $10,000 inclusive	$4,650 plus 60% of compensation in excess of $6,000
$10,001 to $20,000 inclusive	$7,050 plus 50% of compensation in excess of $10,000
$20,001 to $50,000 inclusive	$12,050 plus 45% of compensation in excess of $20,000
over $50,000	$25,550 plus 40% of compensation in excess of $50,000

Maximum Annual Benefit $60,000

Example: If you earn $165/week, your benefit is determined as follows:

a. Annual compensation=$165×52=$8,580

b. Annual benefit=$4,650+(60%×$2,580)= $6,198

c. Monthly benefit=$6,198÷12=$516.50

How long will I continue to receive disability benefits?

You will receive benefits as long as you continue to furnish proof that you are totally disabled but in no event beyond the date of your retirement under the Employee Pension Plan or attainment of age 65.

You will be asked to furnish a physician's statement at intervals as often as deemed reasonably necessary and at least once every twelve months.

Suppose I become too ill to endorse my benefit checks?

Whenever, in the judgment of the Company, you are unable to receive payment and no guardian has been appointed for you, benefits will be paid to your spouse or any other person or institution appearing to be entitled to such payment.

V. BENEFIT REDUCTIONS

If I receive disability benefits from another source, how will they affect my Massachusetts Mutual payments?

Your Massachusetts Mutual disability income will be reduced by the amount of any benefit payable under one or more of the following:

1. Workers' Compensation.
2. Any Salary Continuance program established by the Company.
3. Social Security disability benefits.

   The Social Security offset will be determined by the amount being received at the time the offset is first made and will not be changed by any subsequent increase in Social Security payments or by any Social Security being received by your spouse or children.

   Within five months of the commencement of disability you *must* submit to the Company satisfactory *proof that you have applied for Social Security disability benefits* and *must agree to reimburse* the Company if such application is approved in the *amount of any such offset.* If you do not furnish such proof and agreement, disability payments will be reduced by the amount which the Company determines would be the correct offset if application had been made and approved.
4. Any disability benefit payable by the United States or any other country or international authority in connection with a disability received or contracted while in the Armed Forces.
5. Any coverage required or provided by any statute including, but not limited to, any federal or state no-fault motor vehicle insurance act.

6. 50% of any earnings gained during rehabilitative employment (see Section VII).

Example: Monthly compensation before being disabled: $715
Monthly disability benefit: $516.50
Monthly Social Security benefit: $385.10
Net monthly payment from Plan=$516.50—$385.10=$131.40

In no event may the amount of disability benefits, combined with those payable under any of the above mentioned reductions and any rehabilitation earnings not offset, exceed 90% of the monthly cash compensation received by you from the Company immediately prior to the date that disability benefits commenced under this Plan. In the example shown above total benefits equal 72% of predisability income and are, therefore, within the 90% limit.

VI. CONDITIONS EXCLUDED FROM BENEFITS

Once I become a member are there any situations which would prevent my being eligible to receive benefits?

Yes, there are. You will not be eligible for benefits if your disability results directly or indirectly from:

1. Intentional self-inflicted injury.
2. Bodily injury, mental illness or disease of any kind received or contracted while in the Armed Forces if such disability occurs within two years from the date of employment or reemployment.

Are illnesses or accidents that first appeared prior to eligibility for the plan excluded from coverage?

Yes. If you received medical care or treatment for any illness or injury during the 12 months prior to your enrollment in the Plan, no benefits will be payable for any

period of total disability related to that illness or injury that starts within 24 months following enrollment.

There are two exceptions to the above.

1. If you receive no treatment for the pre-existing condition for a period of 12 months following your enrollment in the plan, you will then be eligible for benefits.

2. If you were an active employee of the Company on November 1, 1976, and you have been continuously employed, the pre-existing condition clause does not apply.

VII. REHABILITATION

What happens if, after receiving benefits, I become able to work again?

If, while totally disabled you return to work, your earnings will be added to and become a part of your benefit offset. However, if the employment is determined by the Company to be rehabilitative in nature, it may specify a period of time not exceeding 24 months during which not more than 50% of the earnings will be offset (see Section IV).

What if my attempt at rehabilitation fails?

Your acceptance of earnings during a period of rehabilitation will not adversely affect your right to receive benefits should you remain totally disabled after your rehabilitation employment ceases.

VIII. PLAN ADMINISTRATION AND PARTICIPANT'S RIGHTS

Who's in charge?

The Administrative Committee is responsible for the approval or denial of benefits. The Employee Benefits Section of the Personnel Department is responsible for all administrative and record keeping duties, including payment of benefits and communications with plan members. Benefits are disbursed directly from assets of the Company.

Administrative Committee: James R. Martin,
Plan Administrator,
Tel. No. 413-788-8411
William J. Clark
J. Berkley Ingram, Jr.
C. Norman Peacor
A. Peter Quinn, Jr.

To whom do I write if I have a question or complaint?

Any communication regarding denial of benefits should be addressed to:

Plan Administrator, Disability Plan
c/o Employee Benefits Section
Personnel Department
Massachusetts Mutual Life Insurance Company
1295 State Street
Springfield, MA 01111

The agent for legal process is:

A. Peter Quinn, Executive Vice President
and General Counsel
Massachusetts Mutual Life Insurance Company
1295 State Street
Springfield, MA 01111
or the Plan Administrator

All other communications should be sent to:

Employee Benefits Section
Personnel Department
Massachusetts Mutual Life Insurance Co.
1295 State Street
Springfield, MA 01111

What other rights do I have under the plan?

As a participant, you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974. ERISA provides that all plan participants shall be entitled to:

1. Examine, without charge, at the plan administrator's office and at other worksites, all plan documents, including insurance contracts and copies of all documents filed by the plan with the U.S. Department of Labor, such as detailed annual reports and plan descriptions.

2. Obtain copies of all plan documents and other plan information upon written request to the plan administrator. The administrator may make a reasonable charge for the copies.

In addition to creating rights for plan participants, ERISA imposes duties upon the people who are responsible for the operation of the employee benefit plan. The people who operate your plan, called "fiduciaries" of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries. No one, including your employer or any other persons, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a welfare benefit or exercising your rights under ERISA. If your claim for a welfare benefit is denied in whole or in part you must receive a written explanation of the reason for the denial. You have the right to have the plan review and reconsider your claim. Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the plan and do not receive them within 30 days, you may file suit in a federal court. In such a case, the court may require the plan administrator to provide the materials and pay you up to $100 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of

the administrator. If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court. If it should happen that plan fiduciaries misuse the plan's money, or if you are discriminated against for asserting your rights you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court. The court will decide who should pay court costs and legal fees. If you are successful the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous. If you have any questions about your plan, you should contact the plan administrator. If you have any questions about this statement or about your rights under ERISA, you should contact the nearest Area Office of the U.S. Labor-Management Services Administration Department of Labor.

MASSACHUSETTS MUTUAL

LIFE INSURANCE COMPANY,
Springfield, Massachusetts 01111

November, 1977

(14)

No. 84-9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of benefit claims?

PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company *

Cecilia Stevenson

Doris Russell

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* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

MML Blend Investment Company, Inc.
MML Equity Investment Company, Inc.
MML Managed Bond Investment Company, Inc.
MML Money Market Investment Company, Inc.
MassMutual Corporate Investors Inc.
MassMutual Income Investors Inc.
MassMutual Mortgage and Realty Investors
MassMutual Liquid Assets Trust
Maslif One & Co.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983) and appears in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a to 25a. The order of the United States District Court for the Central District of California granting petitioners' motion for summary judgment, as well as the findings of fact and conclusions of law issued in connection therewith, are unreported and appear in the Appendix to the Petition for Certiorari at 26a to 32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 16, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on April 6, 1984. Pet. App. at 34a. A timely petition for a writ of certiorari was filed by petitioners on July 5, 1984, and the petition was granted by Order of this Court dated October 1, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 409, 502 and 503 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1109, 1132, and 1133 (1982), and 29 C.F.R. § 2560.503-1 (1983), promulgated under ERISA Section 503. These provisions are reproduced in the Appendix to the Petition for Certiorari at 35a to 48a.

STATEMENT OF THE CASE

Petitioner Massachusetts Mutual Life Insurance Company ("Mass Mutual") sponsors two employee benefit plans which provide disability benefits to eligible employees. The Employee Salary Continuance Plan provides short-term salary continuation payments to employees who are temporarily disabled from employment due to sickness or injury. The Employee Disability Plan provides long-term disability benefits to totally disabled employees who have exhausted their Salary Continuance payments. Both plans are funded from the general assets of the company, and are provided at no cost to employees.[1]

[1] Copies of both the Employee Salary Continuance Plan and the Employee Disability Plan are filed with the Department of Labor, as required by ERISA Section 104(a)(1)(B), 29 U.S.C. § 1024(a)(1)

The respondent, Doris Russell ("Russell"), worked in Mass Mutual's Los Angeles office as a group claims examiner until May 1979, when she became incapacitated with a back ailment. Russell notified Mass Mutual of her condition and began receiving benefits under the Employee Salary Continuance Plan. Three months later, when Russell's disability had failed to abate, Mass Mutual's Disability Committee[2] recommended that she be examined by an independent orthopedic surgeon. This surgeon concluded that Russell was not physically disabled from performing her usual occupation and that no permanent disability was anticipated. Based on his report, the Plan discontinued Russell's benefits effective October 17, 1979 and notified her of its decision by letter of the same date. Pet. App. at 49a. This letter further advised Russell of her right to appeal the discontinuance of benefits to the Plan Administrator, to review documents relating to the discontinuance of benefits, and to submit in writing further information and comments pursuant to the Claims Procedure contained in the Salary Continuance Plan. *Id.*; *see* Employee Salary Continuance Plan, J. App. at 16.

By letter dated October 22, 1979, addressed to the Director of Group Claims, rather than the Plan Administrator, Russell disputed the medical basis for her termination and stated that "[f]urther information on this will be forthcoming." Pet. App. at 51a. She also indicated that she "definitely wish[ed] to appeal" the

(B) (1982), *see* Pet. App. at 27a, and are reproduced in the Joint Appendix ("J. App.") at p. 11 and p. 32.

[2] Mass Mutual's Disability Committee is composed of the company's Chief Medical Officer and four other employees appointed by the Chief Executive Officer. Members of the Disability Committee receive no compensation above their normal salary for serving on the Committee.

termination of benefits and requested additional information regarding the termination. *Id.* The Plan Administrator subsequently notified Russell that he could not "complete a fair examination of the facts" until he received the additional medical information referred to in her October 22, 1979 letter. Pet. App. at 53a. He assured her, however, that he would "give [her] appeal prompt attention upon receipt of that information." *Id.* Such additional medical information was presented to the Plan Administrator by letter dated November 27, 1979, and included a report from Russell's psychiatrist indicating that she was suffering from a psychosomatic disability with physical manifestations rather than an orthopedic illness. Pet. App. at 54a.

The Plan Administrator treated Russell's November 27, 1979 letter as a formal appeal and referred it to the Disability Committee for review. Thereafter, at the Disability Committee's request, Russell was examined by an independent psychiatrist, who concluded that Russell was temporarily disabled due to psychiatric illness in a report dated February 15, 1980. Based on this report, the Disability Committee recommended that Russell's benefits be reinstated retroactively, which recommendation was adopted by the Plan Administrator. Russell was advised of this decision by letter dated March 11, 1980, Pet. App. at 56a, and payment of all benefits was made two days later. Pet. App. at 28a, 57a-58a. Russell subsequently submitted an application for long-term disability benefits which also was approved.[3] Pet. App. at 28a.

Notwithstanding that she had received all plan benefits to which she was entitled, Russell brought this action against petitioners in California Superior Court. Her complaint asserted various state law causes of action, including breach of a duty of good faith and fair dealing, breach of fiduciary duty and intentional and negligent infliction of emotional distress, based on the initial suspension of her benefits. As relief, Russell sought both compensatory damages for economic losses and mental anguish[4] and an award of punitive damages.[5]

Petitioners removed the action to the United States District Court for the Central District of California on the ground that Russell's claims related to an ERISA-covered employee benefit plan and thus were governed by federal law. Thereafter, the district court entered summary judgment in petitioners' favor, holding: (a) that ERISA preempted Russell's state law causes of action; and (b) that neither punitive nor compensatory damages was available under ERISA, as a matter of law, in connection with any claim based on the initial termination of her benefits or subsequent review thereof. The court also rejected Russell's contention, raised for the first time in opposition to petitioners' motion, that petitioners had violated ERISA by failing to process her benefits appeal within 120 days, as required by regulations promulgated under ERISA Section 503, 29 U.S.C. § 1133 (1982). *See* 29 C.F.R. § 2560.503-1(h) (1983).

[3] In contrast, Russell was unsuccessful in obtaining disability benefits from the Social Security Administration. *See* Deposition of Plaintiff dated February 26, 1981 at 100 (filed C.D. Cal. Aug. 19, 1981).

[4] In essence, Russell alleged that the termination of her benefits forced her husband, who also was disabled and without income, to cash out his retirement savings in December, 1979. Moreover, Russell claimed that her psychiatric condition was exacerbated as a result of Mass Mutual's alleged untimely and improper processing of her claim and, accordingly, sought damages for mental and emotional distress.

[5] Russell's complaint also included a claim for wrongful discharge under state law which was asserted against both Mass Mutual and Cecilia Stevenson, Russell's supervisor at the company. That claim is not at issue in this proceeding.

Pet. App. at 29a. In this respect, the court specifically held that a decision had been "timely rendered," apparently agreeing that Russell's appeal had commenced upon receipt of her November 27, 1979 letter, thus bringing petitioners' disposition of that appeal on March 11, 1980 well within the 120-day limit.

On appeal, the Ninth Circuit affirmed the district court's ruling that ERISA preempted Russell's state law causes of action. Pet. App. at 8a. It further ruled, however, that ERISA affords plan participants, like Russell, an implied cause of action for breach of fiduciary duty based upon alleged improper or untimely processing of benefit claims. Pet. App. at 10a. In this regard, the Court of Appeals peremptorily rejected the district court's finding that Russell's appeal had been processed in a timely manner. Rather, the Court ruled that respondent's appeal had commenced upon receipt of her initial letter of October 22, 1979, thus placing the final determination approximately twelve days beyond the 120-day limit. Pet. App. at 11a-12a. Although the regulations governing the processing of benefit claims under ERISA indicate only that a "claim shall be deemed denied" if not resolved within this 120 day period, 29 C.F.R. § 2560.503-1(h)(4), the Ninth Circuit ruled that this twelve-day delay constituted a breach of fiduciary duty under ERISA.

The Court further concluded that this "untimely" decision could support both an award of extra-contractual compensatory damages, including relief for mental or emotional distress, and, where the fiduciary acted with "actual malice or wanton indifference to the rights of participants or beneficiaries," an award of punitive damages. In so holding, the Court relied entirely upon language in ERISA Section 409, which subjects fiduciaries to, among other things, "such other equitable or remedial relief as the Court may deem appropriate." Pet. App. at 13a, 16a. This provision, the

Court found, conferred broad discretion to fashion appropriate punitive and compensatory relief even though: (a) the express terms of Section 409 authorize recovery only on behalf of the plan itself and not individual participants; (b) punitive damages are neither equitable nor remedial in nature, but rather, as the Court of Appeals conceded, are designed to "punish the wrongdoer and deter others from similar misconduct," Pet. App. at 16a; and (c) Congress expressly provided a cause of action to plan participants and beneficiaries in the benefit claims context limited solely to recovery of benefits and enforcement and clarification of rights under the plan, ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B) (1982). On this basis, the Court remanded the case to the district court for further proceedings.

SUMMARY OF ARGUMENT

It is now over four years since Doris Russell received the full benefits to which she was entitled under Mass Mutual's Salary Continuance Plan. Nonetheless, the parties are still embroiled in litigation over whether she is entitled to an additional recovery of punitive or compensatory damages under ERISA based on the manner in which her claim for benefits was processed. In holding that ERISA authorized such remedies, the Ninth Circuit ignored Section 502(a)(1)(B) of the Act which specifically limits plan participants and beneficiaries to the recovery of benefits due under a plan or the enforcement or clarification of their rights to such benefits. Rather, the Ninth Circuit relied on Section 409 of ERISA which subjects fiduciaries to, among other things, appropriate "equitable or remedial relief" for violations of ERISA's fiduciary responsibility provisions. This interpretation is contrary to the plain language of both Section 409 and ERISA in general and finds no support in the statute's legislative history. Moreover, unless reversed, it will have significant and adverse consequences for the administra-

tion of employee benefit plans as well as the federal courts.

ERISA Section 409, on its face, nowhere authorizes an award of punitive damages in the benefits context. Nor does it authorize any relief whatsoever on behalf of individual plan participants or beneficiaries. Rather, by its express terms, Section 409 provides relief only to an employee benefit plan itself for breaches of fiduciary duty which occur in the management or investment of plan assets. Moreover, even apart from these considerations, Section 409's reference to other "equitable or remedial relief" could not support the Ninth Circuit's conclusion unless the common meaning of those terms is completely disregarded. As the courts have recognized with near unanimity, punitive damages are neither remedial nor equitable in nature, but are private fines designed to punish the wrongdoer and deter future misconduct.

Similarly, the Ninth Circuit's ruling finds no basis in ERISA's legislative history. That history not only confirms that Section 409 was designed to provide relief only to employee benefit plans, but, more importantly, makes no mention of punitive damages as a potential remedy. Instead, Section 409 underscores Congress' intention to use equitable, and not legal, means to redress or restrain fiduciary violations. This intent is evident both in the range of equitable remedies identified in the legislative history and in Congress' direction that ERISA be construed in accordance with the law of trusts, an area generally considered within the exclusive province of equity courts. Moreover, any intent on the part of Congress to authorize a punitive damages remedy is further belied by ERISA's comprehensive enforcement provisions, which make extensive use of civil and criminal penalties.

The impact of the Ninth Circuit's ruling upon the administration of the thousands of employee benefit plans in this country can be anticipated to be both significant

and adverse. As a threshold matter, it will frustrate the orderly internal resolution of claims disputes contemplated by ERISA Section 503. If participants may obtain punitive damages based on initial decisions which are corrected in the internal appeals process, Congress' purpose in requiring such procedures—to create a non-adversarial method of claims settlement, and avoid lengthy and expensive litigation—will be largely negated. Lured by the prospect of large punitive damage awards, participants will have little incentive to settle their claims. Similarly, plans themselves may be reluctant to correct their own errors in fear that such action would lay the groundwork for a punitive damages claim. The inevitable consequence of such a breakdown in the internal appeals process will be a dramatic increase in litigation in general, and federal court litigation in particular, since all actions for relief under Section 409 are within the exclusive jurisdiction of the federal courts.

Nor will the adverse impact of the Ninth Circuit's ruling be limited to the claims appeals process. The prospect of potentially crippling personal liability may deter many qualified individuals from serving as fiduciaries, particularly since insurance against punitive damages is unavailable in many jurisdictions. Moreover, rather than face such personal liability, those individuals who do serve may sacrifice the interests of the plan in favor of paying questionable claims for benefits or by settling claims they otherwise would resist. Lastly, because punitive damages awards historically have been based on standards that are ill-defined and unevenly applied, they are incompatible with Congress' desire to establish a "uniform source of law for evaluating fiduciary conduct" in ERISA.

For much the same reasons, this Court also should reverse the Ninth Circuit's ruling that Section 409 authorizes an award of extra-contractual compensatory damages to plan participants and beneficiaries for the improper or untimely processing of a benefit claim. Just

as in the case of punitive damages, neither the plain language of Section 409 nor its legislative history suggests that Congress intended to make individual relief available, much less relief for such matters as pain and suffering or emotional distress Moreover, since the Ninth Circuit's ruling would hold fiduciaries accountable for any consequential harm suffered by a plan participant while his claim was under review, even that which they could not remotely anticipate, it would render meaningless the express limitations on relief set forth in ERISA Section 502(a)(1)(B). Finally, the Ninth Circuit's ruling on this issue poses the same threat to the proper administration of employee benefit plans in the federal courts presented by its punitive damages ruling. For this reason alone, it should be overturned.

ARGUMENT

I. THE CIVIL ENFORCEMENT REMEDIES OF ERISA MAKE NO PROVISION FOR AN AWARD OF PUNITIVE DAMAGES

As this Court has observed, ERISA is a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62 (1980), enacted after years of careful study and analysis to redress flaws evident in the private retirement system. In drafting ERISA, Congress was "constrained to recognize the voluntary nature of private retirement plans," and the importance of formulating safeguards which would not impede plan growth. *See* H.R. Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Public Law No. 93-406, Subcommittee on Labor, Committee on Labor and Public Welfare, United States Senate (April, 1976) ("Legislative History") at 2348. Congress thus sought to "strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs and the need of the

workers for a level of protection which [would] adequately protect their rights and just expectations." *Id.* at 2356. Congress accomplished this goal by, among other things, establishing uniform standards governing reporting, disclosure and fiduciary responsibility, while at the same time placing reasonable limits on the costs and administrative burdens that employers face in connection with these reforms. *Id.* at 2348. This careful balance of competing interests would be upset if punitive damages awards were made available.

A. The Statutory Language of ERISA Does Not Authorize an Award of Punitive Damages

As this Court has made clear on numerous occasions "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see I.N.S. v. Phinpathya*, 104 S. Ct. 584, 589 (1984); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Where a statutory provision is "clear and unambiguous on its face," that language generally must be regarded as dispositive. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978); *Ex parte Collett*, 337 U.S. 55, 61 (1949); *see also Central Trust Co. v. Official Creditors Committee*, 454 U.S. 354, 359-60 (1982). The decision below represents a sharp departure from this rudimentary principle—ERISA nowhere authorizes a participant or beneficiary to recover punitive damages against fiduciaries for improper or untimely processing of benefit claims.

Section 409 of ERISA, the stated basis for the Ninth Circuit's ruling, sets forth the remedies which can be assessed against ERISA fiduciaries for breach of the fiduciary responsibility provisions of the statute. That provision provides in pertinent part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this

> subchapter shall be personally liable to make good *to such plan* any losses to the plan resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject *to such other* equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (1982) (emphasis added). As is evident, Section 409 does not expressly authorize an award of punitive damages against errant fiduciaries. Nor does it authorize any relief whatsoever on behalf of individual participants or beneficiaries. Rather, by its express terms, Section 409 makes relief available only to plans as a whole for breaches of fiduciary duty in the management or investment of plan assets.

This reading of Section 409 is confirmed by the civil enforcement provisions of the statute. Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), authorizes four categories of individuals to file suit "for appropriate relief under section 409": (1) the Secretary of Labor; (2) participants; (3) beneficiaries; or (4) fiduciaries. The common interest shared by each of these parties is the financial soundness and integrity of the plan itself, rather than any particularized injury suffered by a single participant or beneficiary.

In sharp contrast, where Congress intended to extend participants and beneficiaries a cause of action for claims arising from their individual rights under an employee benefit plan, it did so expressly. Section 502(a)(1)(B) authorizes a participant or beneficiary to bring suit:

> to recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B) (1982). In view of the limited remedies expressly set forth in this provision,

the courts have uniformly held, and the Ninth Circuit implicitly conceded,[6] that Section 502(a)(1)(B) does not authorize an award of punitive damages to participants and beneficiaries in connection with a benefits dispute.[7] *See, e.g., Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984) (punitive damages not available in action or plan benefits under ERISA Section 502(a)(1)(B)); *Diano v. Central States, Health, Welfare & Pension Funds*, 551 F. Supp. 861 (N.D. Ohio 1982) (same).

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[6] The Ninth Circuit rested its holding solely on Section 409, implicitly recognizing that Section 502(a)(1)(B) could not authorize an award of punitive damages. Indeed, Section 502(a)(1)(B) is nowhere mentioned in the Court's discussion of punitive damages. Likewise, the courts that have approved the availability of punitive damages under ERISA, with rare exceptions, have based their conclusion solely on Section 409, and not on Section 502(a)(1)(B). *See, e.g.*, Eaton v. D'Amato, 581 F. Supp. 743 (D.D.C. 1984); Jiminez v. Pioneer Diecasters, 549 F. Supp. 677 (C.D. Cal. 1982); Bobo v. 1950 Pension Plan, 548 F. Supp. 623 (W.D.N.Y. 1982); Free v. Gilbert Hodgman, Inc., 3 Empl. Ben. Cas. (BNA) 1010 (N.D. Ill. 1982).

[7] Nor does Section 502(a)(3), 29 U.S.C. § 1132(a)(3) (1982), supply the requisite statutory authorization for the punitive damages award approved by the Court of Appeals in this case. That section allows participants, beneficiaries or other fiduciaries to "enjoin any act or practice" found to violate ERISA or the plan, or to obtain "other appropriate equitable relief," and is expressly patterned on Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(g) (1982) (providing Title VII complainants with "any other equitable relief as the Court deems appropriate"). This precise language not only has been held to preclude an award of punitive damages under ERISA, *see* Bell v. Southern Oregon Log Scaling Bureau, 1 Empl. Ben. Cas. (BNA) 1439 (D. Ore. 1976), but also, universally has been interpreted to preclude such relief under Title VII. *See, e.g.*, Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982); Shah v. Mt. Zion Hospital & Medical Center, 642 F.2d 268 (9th Cir. 1981); DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980); Harrington v. Vandalia-Butler Board of Education, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977); Pearson v. Western Electric Co., 542 F.2d 1150 (10th Cir. 1976).

Nor does Section 409's reference to "equitable or remedial relief" afford a basis for punitive damages as the Ninth Circuit found. It is a "fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Summit Valley Industries v. Local 112 United Brotherhood of Carpenters*, 456 U.S. 717, 722 (1982) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). As this Court recently explained, "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a Court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Punitive damages, both by definition and in common experience, have never been treated as remedial or equitable in nature. Rather, they are "private fines levied . . . to punish reprehensible conduct and to deter its future occurrence." [8] *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 246, 266-67 (1981); *Smith v. Wade*, 461 U.S. 39, 49 (1983); *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 628 (1984) (Blackmun, J., dissenting). Thus, contrary to the Ninth Circuit's ruling, the plain language of Section 409 can provide no basis for a punitive damages award.[9]

[8] Indeed, notwithstanding the Ninth Circuit's novel construction of the terms "equitable" or "remedial" relief, it concedes that the "primary role of punitive damages is not to compensate the victim of intentional wrongdoing, but to punish the wrongdoer and deter others from similar misconduct." Pet. App. at 16a.

[9] Not surprisingly, the vast majority of courts has concluded, contrary to the Ninth Circuit, that neither Section 409, nor ERISA

B. The Legislative History of ERISA Likewise Fails to Support an Award of Punitive Damages

The Ninth Circuit's conclusion that Section 409 authorizes punitive relief not only is contrary to the plain language of that provision, but also, finds no support in ERISA's legislative history. Indeed, if anything, the legislative history indicates that the punitive sanctions approved by the Ninth Circuit were never contemplated by Congress as part of ERISA's statutory scheme.

As a preliminary matter, Section 409's legislative history confirms that this provision was designed to provide

in general, provides for punitive damages awards. *See, e.g.*, Zittrouer v. UARCO, 582 F. Supp. 1471 (N.D. Ga. 1984) (punitive damages not available under ERISA); Whitaker v. Texaco, Inc., 566 F. Supp. 745 (N.D. Ga. 1983) (punitive damages not available against fiduciary under section 409); Diano v. Central States Health, Welfare & Pension Funds, 551 F. Supp. 861 (N.D. Ohio 1982) (punitive damages not available under ERISA); Calhoun v. Falstaff Brewing Corp., 478 F. Supp. 357 (E.D. Mo. 1979) (same); Hurn v. Retirement Fund Trust of Plumbing Industry, 424 F. Supp. 80 (C.D. Cal. 1976) (same); Sheahan v. Leahy, No. 84-1833C(B) (E.D. Mo. Aug. 23, 1984) (same); UAW v. Federal Forge, Inc., No. G83-330 (W.D. Mich. Apr. 5, 1984) (same); Heine v. Clark Equipment Co., No. 82-C-1286 (N.D. Ill. Dec. 21, 1983) (same); Scheirer v. NMU Pension & Welfare Plan, No. 82 Civ. 5544 (S.D. N.Y. Sept. 15, 1983) (same); Jackson v. Occidental Life Insurance Co., No. C-80-4288 SW (N.D. Cal. Mar. 2, 1981) (same); Ziskind v. Retail Clerks International Association, 3 Empl. Ben. Cas. (BNA) 1012 (E.D. Cal. 1982) (punitive damages not available against fiduciary under section 409); Rogers v. Northern California Retail Clerks Trust Fund, No. C-77-1904 (N.D. Cal. June 8, 1978) (punitive damages not available under ERISA); and Bell v. Southern Oregon Log Scaling Bureau, 1 Empl. Ben. Cas. (BNA) 1439 (D. Ore. 1976) (same). *See also* Bittner v. Sadoff & Rudoy Industries, 728 F.2d at 825-86 (punitive damages not available in action for plan benefits under ERISA Section 502(a)(1)(B)); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) (punitive damages not provided by ERISA) (dictum).

relief to employee benefit plans as a whole, and not to individual participants or beneficiaries complaining of improper processing of benefit claims. Congress was primarily concerned with the threat to the financial stability of employee benefit plans posed by fiduciaries who failed to discharge their plan responsibilities in accordance with their fiduciary obligations. *See* S. Rep. No. 383, 93d Cong., 1st Sess., *reprinted in* Legislative History at 1063, 1076. In order to ensure that fiduciaries carried out their duties in a manner that would not jeopardize a plan's income or assets, Congress made clear that fiduciaries would be personally liable *to the plan* for any losses resulting from a breach of duty as well as any personal profits which they derived therefrom. *See, e.g.*, Summary of Major Provisions of S. 4, Williams-Javits Pension Reform Bill, *reprinted in* Legislative History at 201 (fiduciary who breaches trust personally liable for losses resulting from such breach); S. Rep. No. 127, 93d Cong., 1st Sess., *reprinted in* Legislative History at 619 (fiduciary personally liable to reimburse fund for losses resulting from breach and to pay over personal profit realized through use of fund assets); S. Rep. No. 383, 93d Cong., 1st Sess., *reprinted in* Legislative History at 1076, 1100 (same); H. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* Legislative History at 4587 (same). In short, Section 409 was never intended to provide relief to individual participants or beneficiaries, but only the plan itself. *See Zink v. Heiser*, 109 Misc. 2d 354, 438 N.Y.S. 2d 209 (Sup. Ct. 1981) (recovery against fiduciary under Section 409 available only to plan and not to participants or beneficiaries).

Even more significantly, no mention of punitive damages as a potential remedy can be found in ERISA's legislative history, which spans over 15 volumes of material. To the contrary, the numerous Committee reports as well as statements by ERISA's sponsors all indicate that Congress intended to use equitable measures to redress or restrain violations of fiduciary duty. *See, e.g.*, S. Rep. No. 383, 93d Cong., 1st Sess., *reprinted in* Legislative History at 1173; Summary of Differences Between Senate Version and House Version of H.R. 2, prepared for House and Senate Conferees, Part Three, Fiduciary and Enforcement (June 12, 1974), *reprinted in* Legislative History at 5251; Introductory Statement of Senator Javits on S. 1557, *reprinted in* Legislative History at 279. Thus, the legislative history refers not only to the imposition of personal liability on plan fiduciaries for breach of trust, but also to other appropriate equitable relief, such as injunctions to prevent violations of fiduciary duty, the imposition of constructive trusts on plan assets where needed to protect the participants and beneficiaries and the removal of fiduciaries.[10] S. Rep. No. 383, 93d Cong., 1st Sess., *reprinted in* Legislative History at 1173-1174. Nowhere in the range of equity-oriented remedies identified by Congress is there even a suggestion of an intent to provide punitive damages.

That the remedies contemplated by Section 409 and, indeed, ERISA as a whole, are equitable in nature, and thus incompatible with punitive damages, is further evidenced by Congress' clear direction that ERISA be construed in accordance with the law of trusts. As the legislative history indicates, "the fiduciary responsibility sec-

[10] Taking their cue from the legislative history, the Courts have imposed a wide range of equitable remedies under Section 409 including removal of the fiduciary, *see Marshall v. Snyder*, 430 F. Supp. 1224, 1233 (E.D. N.Y. 1977), *aff'd in part and remanded in part*, 572 F.2d 894 (2d Cir. 1978), appointment of independent managers to invest the plan's assets, *see Donovan v. Mazzola*, 2 Empl. Ben. Cas. (BNA) 2115, 2138 (N.D. Cal. 1981), injunctions against, and rescission of transactions violative of the statute, *see Eaves v. Penn*, 587 F.2d 453, 463 (10th Cir. 1978); *Gilliam v. Edwards*, 492 F. Supp. 1255 (D.N.J. 1980), and prohibitions against future transactions between employee benefit plans and fiduciaries found guilty of misconduct, *see Marshall v. Carroll*, 2 Empl. Ben. Cas. (BNA) 2491, 2500 (N.D. Cal. 1980).

tion, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts." S. Rep. No. 533, 93d Cong., 1st Sess. *reprinted in* Legislative History at 2358; *see* S. Rep. No. 127, 93d Cong., 1st Sess., *reprinted in* Legislative History at 615; *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982); *Eaves v. Penn*, 587 F.2d 453, 457 (10th Cir. 1978). *See also National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322 (1981) (ERISA codifies traditional fiduciary standards developed under trust laws). Remedies for breach of trust always have been within the exclusive province of equity courts.[11] *See, e.g.*, 3 A.W. Scott, The Law of Trusts § 197, at 1625 (3d ed. 1967); Restatement (Second) of Trusts, § 197 (1959). Punitive damages, however, are not an equitable remedy, but a traditional form of legal relief offered only in courts of law. *See Curtis v. Loether*, 415 U.S. 189, 196 (1974); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982); *Richerson v. Jones*, 551 F.2d 918, 927 (3d Cir. 1977); *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1152 (10th Cir. 1976). Given its reliance on trust principles in drafting ERISA, Congress could not have intended to include punitive damages among the remedies authorized by ERISA without some affirmative statement to that effect.[12] *See National Labor Relations Board v. Amax Coal Co.*, 453 U.S. at 330.

[11] Congress' characterization of ERISA's remedies as equitable, and not legal in nature, has led the Courts to conclude with near universality that a jury trial is *not* available to participants seeking relief under the statute. *See, e.g.*, Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980); Wardle v. Central States Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); Chastain v. Delta Air Lines, Inc., 496 F. Supp. 979 (N.D. Ga. 1980).

[12] In addition, as Senator Javits, one of the principal sponsors of ERISA, stated in describing the principles to be applied under the fiduciary enforcement provisions: "Fiduciary breaches may be rectified through civil suits only. Criminal penalties for such breaches are inconsistent with the principles established under the common law of trusts." Introductory Statement by Senator Javits on S. 1557, *reprinted in* Legislative History at 279. Although punitive damages are nominally classified as civil in nature, they resemble criminal sanctions and have been characterized as "quasi-criminal" on more than one occasion. *See* Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

The isolated references in ERISA's legislative history to "the full range of legal and equitable remedies available in both state and federal courts," relied on by the Court below, do not support a contrary conclusion. *See* Pet. App. at 16a. Those statements had their genesis in an earlier version of ERISA which did, in fact, provide a civil action for "legal or equitable" relief to redress breaches of fiduciary duty.[13] The civil enforcement provisions ultimately included in ERISA, however, were far more circumscribed and eliminated all references to "legal relief." As noted earlier, in connection with benefit claims, they limited participants and beneficiaries to a cause of action for benefits due and clarification or enforcement of rights under the plan. *See* ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1982). All other ERISA actions could be brought by participants, beneficiaries, the Secretary of Labor, or fiduciaries and, similarly, were limited to injunctive or other forms of equitable relief. *See* Section 502(a)(2), (3), (5), 29 U.S.C. § 1132(a)(2), (3), (5) (1982). Thus, the significance attached to the phrase "legal and equitable

[13] The full text of this provision stated in pertinent part:

> Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary . . . may be brought by any participant or beneficiary of any employee benefit plan or fund . . . in any court of competent jurisdiction, State or Federal . . . .

See S. 4, Section 603, 93d Cong., 1st Sess. (Apr. 18, 1973), *reprinted in* Legislative History at 579; *see also* H.R. 2, Section 693, 93d Cong., 2d Sess. (March 4, 1974), *reprinted in* Legislative History at 3816; S. 1179, Section 501(d), 93d Cong., 1st Sess. (Aug. 21, 1973), *reprinted in* Legislative History at 950.

remedies" by the Ninth Circuit is negated by the substantial revisions made in Section 502.[14]

Moreover, a mere reference to "legal relief" is insufficient to provide the unambiguous evidence of Congressional intent necessary to support a punitive damages award. In similar statutes, which espouse essentially remedial objectives, this Court has refused to permit punitive sanctions in the absence of clear Congressional guidance. *See, e.g., International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 52 (1979); *Local 20 Teamsters Union v. Morton*, 377 U.S. 252, 260-61 (1964); *Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *accord Pressman Unions Fund v. Continental Assurance Co.*, 700 F.2d 889, 892 (2d Cir.), *cert. denied*, 104 S. Ct. 148 (1983) (court will not infer remedy under ERISA without affirmative indication of Congressional intent). Punitive damages, of course, are but one form of "legal relief" and generally are heavily disfavored. *See Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J. dissenting); *Lee v. Southern Home Sites*

[14] The Ninth Circuit's reliance on language in ERISA's Declaration of Policy providing for appropriate "sanctions" under the Act similarly is misplaced. This reference relates to the sanctions which are expressly provided by ERISA, including statutory fines, Section 502(a)(1)(A), (a)(4), (c), 29 U.S.C. § 1132 (a)(1)(A), (a)(4), (c) (1982) and criminal penalties, Sections 502, 511, 29 U.S.C. §§ 1131, 1141 (1982), rather than additional remedies not specifically authorized by statute. Likewise, the Ninth Circuit's contention that only punitive damages could "prevent violations of the Act," is equally unavailing. Far from relying on punitive damages, Congress expressed a preference for injunctive relief in ERISA to assure that such violations do not occur. *See* Joint Explanatory Statement of Committee on Conference, *reprinted in* Legislative History at 5494 (Secretary of Labor Authorized to enjoin act or practice violating ERISA Title I); S. Rep. No. 383, 93d Cong., 1st Sess., *reprinted in* Legislative History at 1173 (injunctions may be granted to prevent breach of fiduciary duty).

Corp., 429 F.2d 290, 294 (5th Cir. 1970); *Wright v. Kaine Realty*, 352 F. Supp. 222, 223 (N.D. Ill. 1972). Thus, without more, a simple reference to "legal relief" in the legislative history falls far short of the unequivocal evidence of Congressional intent which this Court has found essential before an additional remedy, not expressly provided in a statute, may be inferred. *Cf. National Labor Relations Board v. Amax Coal Co.*, 453 U.S. at 330; *Owen v. City of Independence*, 445 U.S. 622, 637 (1980).[15]

C. ERISA's Comprehensive Statutory Scheme Precludes a Finding That Congress Intended to Authorize Punitive Damages Awards

In addition to ERISA's express language and legislative history, the very structure of the Act precludes a finding that Congress intended to make punitive damages available. In a long line of cases, this Court has counselled against implying remedies beyond those expressly provided by Congress. *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *Texas Industries, Inc. v. Rad-*

[15] In analogous contexts, the courts similarly have refused to predicate punitive relief solely on the basis of a single reference to legal remedies. Courts construing the Age Discrimination in Employment Act, which provides expressly for "legal or equitable relief" in its civil enforcement provisions, have uniformly rejected efforts to include punitive damages within the range of acceptable remedies. *See, e.g., Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). In each of these cases, the court looked beyond the phrase "legal relief" to the statutory context, policies and enforcement framework embodied in the Act, and concluded that no intent to authorize recovery of such extraordinary sanctions could be ascertained. If punitive relief is not appropriate under the ADEA, which is similar in both structure and purpose to ERISA, a fortiorari, it cannot be appropriate under ERISA, which makes no express provision for legal relief.

cliff Materials, Inc., 451 U.S. 630 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). As the Court noted in *Transamerica Mortgage Advisors*, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 444 U.S. at 19. *See also Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Moreover, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. at 97. The Ninth Circuit's approval of punitive damages awards under ERISA squarely contravenes these teachings.

ERISA not only contains unusually detailed and elaborate enforcement provisions, but also makes extensive use of penal and criminal relief to accomplish its objectives. In addition to the equitable remedies described earlier, participants and beneficiaries may file suit to enforce the disclosure and reporting provisions of the Act, and, in appropriate cases, may be awarded penalties of $100 a day against administrators who fail to comply with a proper request for information. *See* ERISA Section 502(a)(1)(A), (a)(4), (c); 29 U.S.C. § 1131(a)(1)(A), (a)(4), (c) (1982). Similarly, fiduciaries who engage in prohibited transactions under ERISA Section 406 may be liable for a civil penalty equal to five percent of the amount involved in the transaction, and, if left uncorrected, one-hundred percent of that amount. ERISA Section 406, 29 U.S.C. § 1106 (1982); Internal Revenue Code Section 4975 (1982). Employers who fail to make contributions to multiemployer plans may be liable for principal and interest on the unpaid contributions as well as an award of liquidated damages and mandatory attorneys' fees. ERISA Section 502(g)(2)(C), 29 U.S.C.

§ 1132(g)(2)(C)(1982). Finally, the Act provides criminal penalties for willful violations of certain ERISA provisions. Under Section 501, imprisonment and fines up to $100,000 may be imposed for violations of the reporting and disclosure provisions of the Act. 29 U.S.C. § 1131 (1982). Similarly, Section 511 imposes imprisonment and fines up to $10,000 upon individuals who willfully interfere with a beneficiary's exercise of rights under ERISA. 29 U.S.C. § 1141 (1982).

These provisions make clear that when Congress desired to provide punitive-type remedies in ERISA, it did so expressly and without hesitation. In view of these elaborate enforcement provisions, it is highly improbable that Congress "absentmindedly forgot to mention an intended private action" allowing for punitive relief. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 20. Indeed, as the Eighth Circuit noted in rejecting punitive damages under ERISA in a similar context: "[i]f Congress had desired to provide for punitive damages it could have easily so stated, as it has in other Acts." [16] *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d

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[16] Congress has expressly provided for punitive damages in a wide variety of statutes. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978 § 1117(a), 12 U.S.C. § 3417 (1982); Securities Exchange Act of 1934 § 21, 15 U.S.C. § 78u(h) (1982); Jewelers Liability Act § 5(c), 15 U.S.C. § 298(c) (1982); Consumer Credit Protection Act §§ 616, 706, 15 U.S.C. §§ 1681n, 1691e(h) (1982); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520 (1982); Tax Equity and Fiscal Responsibility Act of 1982 § 357(a)(c), 26 U.S.C. § 7431(c) (1982); Deepwater Port Act of 1974 § 15(c), 33 U.S.C. § 1514(c) (1982); Civil Rights Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1982); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1982); Railroad Revitalization and Regulatory Reform Act of 1976 § 511(j), 45 U.S.C. § 831(j) (1982); Natural Gas Pipeline Safety Act of 1968 § 12(a), 49 U.S.C. § 1679(a) (1982); Transportation Safety Act of 1974 § 111(a), 49 U.S.C. § 1810(a) (1982); Pipeline Safety Act of 1979 § 209(a), 49 U.S.C. § 2008(a) (1982); and Foreign Intelligence

1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) (dictum); *accord Wilke v. Thiokol*, No. 84-C-1352 (N.D. Ill. June 26, 1984). Congress' failure to so provide demonstrates that it deemed these harsh remedies inappropriate in connection with benefits disputes.

II. THE NINTH CIRCUIT'S DECISION WOULD HAVE AN ADVERSE EFFECT UPON EMPLOYEE BENEFIT PLANS AND THE FEDERAL COURTS

The Department of Labor's most recent studies indicate that in the United States there are approximately 500,000 private pension plans covering over 50 million individuals, and, additionally, an estimated 1.7 million welfare benefit plans sponsored by private employers. *See* U.S. Department of Labor, Labor Management Services Administration, Pension and Welfare Benefits Programs, Estimates of Participants and Financial Characteristics of Private Pension Plans at 1 (1983); 4 Health and Population Study Center, Battelle Human Affairs Research Centers, Employee Welfare Benefit Plans and Plan Sponsors in the Private Nonfarm Sector in the United States, 1978-79 at 24 (1980). Administrators and other fiduciaries to these plans process literally millions of claims for disability, pension and health benefits annually. Unless reversed, the Ninth Circuit's ruling would have a significant adverse impact upon the administration of employee benefit plans in general, and, in particular, upon the manner in which such claims are handled. Moreover, a dramatic increase in federal court litigation over employee benefit claims could be anticipated. These adverse effects far exceed any marginal benefits derived from expanding the remedies available under ERISA to include punitive damages.

Surveillance Act of 1978 § 110, 50 U.S.C. § 1810 (1982). *See also* Clayton Act Section 4, 15 U.S.C. § 15 (1982) (allowing treble damages).

A. Allowing Punitive Damages Awards Would Frustrate the Orderly Internal Resolution of Benefit Disputes

A determination that punitive damages are available under ERISA cannot help but undermine the orderly internal resolution of benefits disputes contemplated by the statute. Under ERISA Section 503, employee benefit plans must establish reasonable claims procedures, providing participants a full, fair and prompt review of any claims initially denied by a plan. ERISA Section 503, 29 U.S.C. § 1133 (1982); 29 C.F.R. § 2560.503-1 (1983). The purpose of such procedures is "to reduce frivolous claims, promote the consistent treatment of claims and create a non-adversarial method of claims settlement." *Taylor v. Bakery & Confectionary Union Welfare Fund*, 455 F. Supp. 816, 820 (E.D.N.C. 1978); *cf. Vaca v. Sipes*, 386 U.S. 171, 191 (1967). In particular, Congress desired to afford both plan participants and plans alike, a quick, effective and largely informal means of resolving their differences, without the need to resort to lengthy and expensive litigation.[17] In recognition of these objectives, the courts generally have required plan participants and beneficiaries, to exhaust the plan's internal review procedure before undertaking litigation.[18] *See, e.g., Kross*

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[17] Although the actual structure of the claims procedure is largely left to the discretion of each plan, the regulations establish certain minimum requirements. Plan participants must be given specific reasons for the denial of a claim, with citations to the pertinent plan provisions on which denial is based, 29 C.F.R. § 2560.503-1 (f)(1), (2) (1983), as well as an opportunity to appeal a denied claim to the appropriate fiduciary, 29 C.F.R. § 2560.503-1(g)(1) (1983). Further, the participant may review pertinent documents and submit issues and comments in writing to the reviewing authority. 29 C.F.R. § 2560.501-1(g)(1)(ii), (ii) (1983). The overall thrust of these provisions is to foster an informal non-adversarial exchange of information, designed to ensure the correctness of final decisions and abate costly and unnecessary litigation.

[18] As the Court has observed on several occasions, the exhaustion requirement presents the most effective means of ensuring that

v. Western Electric Co., 701 F.2d 1238, 1244-45 (7th Cir. 1983); *Amato v. Bernard*, 618 F.2d 559, 567-68 (9th Cir. 1980); *Weeks v. Coca-Cola Bottling Co.*, 491 F. Supp. 1312, 1314 (E.D. Ark. 1980); *Scneider v. United States Steel Corp.*, 486 F. Supp. 211, 213 (W.D. Pa. 1980); *Lucas v. Warner & Swasey Co.*, 475 F. Supp. 1071, 1074 (E.D. Pa. 1979); *Taylor v. Bakery & Confectionary Union Welfare Fund*, 455 F. Supp. at 819-20.

If participants could resort to litigation despite the proper functioning of these internal appeals procedures, the benefits of internal review largely would be negated. No benefits dispute could be resolved internally since the prospect of litigation over punitive damages would remain even where the plan reversed an initial decision and awarded the participant all benefits to which he was entitled. Thus, one of the primary goals of internal review—the avoidance of unnecessary litigation—would be frustrated. Moreover, the availability of punitive damages would serve as a substantial disincentive to plans to remedy their own errors in the internal appeals process. Faced with the prospect of punitive damages litigation, plan fiduciaries might be reluctant to correct initial mistakes in fear that such actions may lay the ground work for a punitive damages claim. Accordingly, rather than encouraging internal resolution of disputes, punitive damages would encourage the costly and time-consuming litigation that Congress hoped to avoid in requiring employee benefit plans to establish claims review procedures.[19]

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administrative bodies have ample opportunity to correct their own errors, and thereby moot judicial controversies. *See* Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Parisi v. Davidson, 405 U.S. 34, 37 (1972); McGee v. United States, 402 U.S. 479, 484 (1971); McKart v. United States, 395 U.S. 185, 195 (1969).

[19] As the court noted in *Taylor v. Bakery & Confectionary Union*:

> Tied to these inter-fund claims procedures was Congress' awareness of the potential costs of pension reform, and it sought to "strike a balance between providing meaningful reform and keeping costs within reasonable limits." Congress was particularly concerned with outlining a private insurance system that would operate efficiently, thereby increasing its acceptance and institution among American business. If claimants were allowed to litigate the validity of their claims before a final trustee decision was rendered, the costs of dispute settlement would increase markedly for employers. Employees would also suffer financially because, rather than utilize a simple procedure which allows them to deal directly with their employer, they would have to employ an attorney and bear the costs of adversary litigation in the courts.

455 F. Supp. at 820 (citations omitted).

Indeed, the Court need look only to this case to witness the harm in making punitive damages available in the benefit claims context. Here, the respondent was advised of the specific grounds for suspending her benefits. She then invoked the plan's claims appeal procedures and brought additional information before the Disability Committee. On the basis of this new data, as well as an independent psychiatric examination, her benefits ultimately were restored retroactively to the date of their discontinuance.

Nevertheless, over four years *after* Russell's benefits were restored in full, the parties are still embroiled in litigation concerning Russell's entitlement to punitive damages arising from the plan's alleged "untimely" resolution of her appeal a mere twelve days beyond the 120-day time limit prescribed by regulation. But for the prospect of a punitive damages award, it is inconceivable that this dispute would not have ended, as Congress intended, with the completion of the internal appeals process. That it has not done so is particularly ironic since the time limit petitioners allegedly violated was designed to insure only that a plan's claim review was not unduly prolonged; indeed, the sole consequence set forth in the regulations for failing to resolve a claim

within the 120 days is that "the claim shall be deemed denied on review." 29 C.F.R. 2560-503-1(h)(4) (1983).[20]

B. Allowing Punitive Damages Awards Would Inhibit the Exercise of Responsible Decisionmaking, Deter Qualified Individuals from Serving as Fiduciaries and Vastly Increase Federal Court Litigation

Beyond deterring internal resolution of disputes, the availability of punitive damages threatens the proper administration of employee benefit plans in other significant ways. First, punitive damages awards could well disrupt the exercise of responsible decisionmaking on the part of plan fiduciaries. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 51-52. Confronted with potential awards of "unforseeable magnitude", fiduciaries might feel compelled to process questionable claims or enter into settlements which they ordinarily would resist. *Id.* at 52. As Justice Rehnquist noted in an analogous context:

> their thoughts likely will be on personal financial consequences that may result from their conduct—but whose limits they cannot predict—and not upon their official duties.

Smith v. Wade, 461 U.S. at 88-89 (Rehnquist, J., dissenting). Thus, far from deterring fiduciaries from violating their ERISA responsibilities, the spectre of punitive damages could operate to "chill" desirable conduct, to the detriment of the plan and the remaining participants and beneficiaries. *Id.* at 59.

Moreover, the prospect of such unpredictable personal liability may deter qualified individuals from serving as

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[20] As the Eighth Circuit observed in Richardson v. Central States Pension Fund, 2 Empl. Ben. Cas. (BNA) 1477 (8th Cir. 1981):

> [I]f the Trustee fails to comply with the mandatory time limits, the claimant may treat such as a denial for purposes of exhausting his administrative remedy.

Id. at 1480.

fiduciaries to employee benefit plans. By statute, fiduciaries serve voluntarily and generally without compensation from the plan.[21] Because insurance against punitive damages awards is unavailable in many jurisdictions,[22] fiduciaries would be forced to pay such awards out of their personal resources. Exposing fiduciaries to potentially crippling liability, with virtually no offsetting personal benefits, would be a substantial disincentive to many qualified individuals to serve as fiduciaries to employee benefit plans.

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[21] ERISA expressly prohibits individuals who are employed by a participating employer, association of employers or employee organization from receiving any compensation from the plan for their additional service as plan fiduciaries. *See* ERISA § 408(c)(2), 29 U.S.C. § 1108(c)(2) (1982). As a result, many individuals receive no compensation beyond their normal salaries for serving as plan fiduciaries. This is especially true of multiemployer plans which are jointly administered by employer and union representatives.

[22] At least 12 states expressly preclude defendants from obtaining insurance reimbursement for punitive damage awards as a matter of public policy. *See, e.g.*, City Products Corp. v. Globe Indemnity Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979) (California); Brown v. Western Casualty & Surety Co., 484 P.2d 1252 (Colo. Ct. App. 1971) (Colorado); American Insurance Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965) (Connecticut); Perez v. Otero, 415 So. 2d 101 (Fla. App. 1982) (Florida); American Surety Co. v. Gold, 375 F.2d 523 (10th Cir. 1966) (Kansas); Norfolk & Western Railway Co. v. Hartford Accident & Indemnity Co., 420 F. Supp. 92 (N.D. Ind. 1976) (Indiana); Crull v. Gleb, 382 S.W.2d 17 (Mo. Ct. App. 1964) (Missouri); City of Newark v. Hartford Accident & Indemnity Co., 134 N.J. Super. Ct., 537, 342 A.2d 513 (1975) (New Jersey); Parker v. Agricultural Insurance Co., 440 N.Y.S.2d 964 (S. Ct. 1981) (New York); Esmond v. Liscio, 224 A.2d 793 (Pa. 1966) (Pennsylvania); Beaver v. County Mutual Insurance Co., 95 Ill. App. 3d 1122, 420 N.E.2d 1058 (1981) (Illinois); Dayton Hudson Corp. v. American Mutual Liability Insurance Co., 621 P.2d 1155 (Okla. 1980) (Okla.); *see also* Wojciak v. Northern Package Corp., 310 N.W.2d 675 (Minn. 1981) (Minn.).

The availability of punitive damages also is sure to inspire a dramatic increase in benefit litigation, which would further tax the financial resources of plans and sponsoring employers alike. Lured by the prospect of large punitive damages awards, participants and beneficiaries would be encouraged to litigate the most frivolous of claims, or, at the least, to embark on renewed efforts to extract favorable settlements from fiduciaries fearful of the risks of heavy financial penalties. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 52; *Smith v. Wade*, 461 U.S. at 59. Moreover, this increase in litigation is hardly speculative. As amici curae have pointed out, participants and beneficiaries in the Ninth Circuit have already begun to file claims for extra-contractual compensatory and punitive damages arising from benefit disputes in reliance on the decision below.[23] *See* Brief of Amici Curiae Pipe Trust, *et al*, filed in support of Petition for Writ of Certiorari, at 8. The costs of defending these suits inevitably will be borne in the first instance, not by fiduciaries, but by the plans themselves, and ultimately their participants and beneficiaries, in contravention of ERISA's goal of protecting the financial integrity of employee benefit plans. *See* ERISA Section 2(a), 29 U.S.C. § 1001(a) (1982).

Moreover, the burdens of this increased litigation will fall principally on the federal courts. Under ERISA Section 502(e)(1), 29 U.S.C. § 1132(e)(1) (1982), state and federal courts share concurrent jurisdiction over benefit actions brought by participants and beneficiaries under Section 502(a)(1)(B). Actions for relief under

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[23] Indeed in the aftermath of the *Russell* opinion, attorneys specializing in civil litigation quickly began to predict that the Ninth Circuit ruling would "encourage" participants or beneficiaries who had "similar claims under ERISA" to file suit for punitive relief. *See* Posner, "Tips on Torts: Some New Relief for Victims of Mishandled ERISA-Benefits Claims," Los Angeles Daily Journal at 4 (July 20, 1984).

section 409—the statutory predicate for punitive damages established by the Ninth Circuit—and, indeed, all other ERISA actions are committed by section 502(e)(1) to the *exclusive* jurisdiction of the federal courts. Because punitive damages may not be awarded under section 502(a)(1)(B), *see Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984), the inevitable consequence of the Ninth Circuit's decision will be the joinder of claims for punitive damages under Section 409 in even the most routine benefits cases, thereby insuring that all such actions are litigated in federal courts. This displacement of state court jurisdiction not only is contrary to Congress' design in fashioning ERISA's enforcement and jurisdictional provisions, but also will further strain limited federal judicial resources which might be used more efficiently in other matters. *See Smith v. Wade*, 461 U.S. at 93-94 (O'Connor, J., dissenting).

Faced with similar consequences, this Court has refused to permit punitive relief in other contexts. In *International Brotherhood of Electrical Workers v. Foust*, *supra*, the Court held that punitive damages were not available against unions for a breach of the duty of fair representation under the Railway Labor Act. Noting that awards of punitive damages could well unsettle the careful balance of individual and collective interests underlying unfair representation suits, the Court declined to find this "extraordinary sanction" necessary to vindicate the employee. 442 U.S. at 52.

In much the same fashion, subjecting fiduciaries to punitive damages awards would unsettle the delicate balance of costs and protections reflected in ERISA. As Congress was careful to observe, while ERISA was designed to protect individual pension rights, "the relative improvements required by the Act [must be] weighed against the additional burdens to be placed on the system." *See* H.R. Rep. No. 533, 93d Cong., 1st Sess., *re-*

printed in Legislative History at 2348. Throughout its deliberations, Congress "was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted." 102 Cong. Rec. S. 15762 (daily ed. Aug. 22, 1974) (Statement of Senator Nelson). Moreover, Congress realized that plans would neither be established nor expanded if the costs to employers were made overly burdensome. 102 Cong. Rec. S. 15735-54 (daily ed. Aug. 22, 1974) (Statement of Senator Long). Confronted with the prospect of substantial unpredictable punitive damages awards, employers would be reluctant to establish employee benefit plans or to expand existing programs for fear of the resulting litigation that could ensue. The Ninth Circuit ruling thus could create the very economic disincentives which Congress hoped to avoid in its comprehensive statutory scheme.

C. The Ninth Circuit's Ruling Would Result in Arbitrary, Inconsistent and Unpredictable Awards

In enacting ERISA, Congress replaced the conflicting system of state and local regulation of employee benefit plans with "a uniform source of law for evaluating fiduciary conduct". *See* Introductory Statement of Senator Javits on S. 1557, *reprinted in* Legislative History at 279; *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890, 2901 (1983). In so doing, Congress hoped to restore predictability and consistency to the employee benefit area, and, thereby, enable fiduciaries to identify with reasonable certainty conduct deemed unacceptable under the Act.[24]

[24] The legislative history is replete with references to Congress' desire to promote uniformity and consistency in the application of ERISA's fiduciary standards. As Congress observed:

> [A] fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may vary from state to state. . . . [I]t is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

H. R. Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* Legislative History at 2359. *See also* 102 Cong. Rec. 15742 (daily ed. Aug. 22, 1974) (Statement of Senator Williams) (ERISA substantive and enforcement provisions intended to eliminate threat of conflicting or inconsistent state or local regulation); 102 Cong. Rec. S. 15751 (daily ed. Aug. 22, 1974) (Statement of Senator Javits) (interest of uniformity with respect to interstate plans in ERISA required displacement of all state action).

See H. R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted* in Legislative History at 2359. Injecting punitive damages into this framework would further undermine ERISA's objectives by hampering uniform application of fiduciary principles.

As both courts and commentators have observed, punitive damages awards are becoming increasingly commonplace. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 271 (1983); Long, *Punitive Damages: An Unsettled Doctrine*, 25 Drake L. Rev. 876, 887 (1976). At the same time, such awards have rested on standards which are both ill-defined and unevenly applied. *See Smith v. Wade*, 461 U.S. at 60 (Rehnquist, J., dissenting); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 52-53 (1982). Lacking a consistent framework of analysis, the courts have developed a variety of ad hoc tests designee to determine both the entitlement to, and the measure of, punitive relief.[25] *See Smith v. Wade*, 460 U.S. at 60-64 (Rehn-

[25] The standards employed have ranged from "malicious" to "reckless disregard" and varying degrees of negligence. *See* Smith v. Wade, 461 U.S. at 61-62 (Rehnquist, J. dissenting). *See also* Boals v. Gray, 577 F. Supp. 288 (N.D. Ohio 1983) (malicious, wanton or oppressive act sufficient for award of punitive damages); Kann v. Keystone Resources, Inc., 575 F. Supp. 1984 (W.D. Pa.

quist, J., dissenting). The amounts awarded under these standards have been subject to few constraints and, in practice, punitive damages awards have been assessed in "wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350; *see International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 50.[26] Moreover, the arbitrary nature of these standards often fail to provide defendants with fair warning of the consequences of their actions, thus negating the primary purpose of punitive damages awards—the deterrance of conduct which violates federal standards. *See* Long, *Punitive Damages: An Unsettled Doctrine*, 25 Drake L. Rev. at 881.

1983) (act committed with bad motive or with reckless indifference); Lake Havasu Resort, Inc. v. Commercial Loan Ins. Co., 139 Ariz. 369, 678 P.2d 950 (Ariz. Ct. App. 1984) (aggravated, wanton, reckless or malicious conduct); Huggins v. Deinhard, 127 Ariz. 358, 621 P.2d 45 (Ariz. Ct. App. 1980) (outrageous, willful, malicious in fact, done in bad faith or with reckless indifference to rights of others); Boyton v. Lopez, 473 A.2d 375 (D.C. App. 1984) (willful or outrageous conduct or conduct which results in gross fraud); Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 665 P.2d 661 (1983) (extreme deviation from reasonable standards of conduct performed by defendant with understanding or disregard for its likely consequences); Pendowski v. Patent Scaffolding Co., 89 Ill. App. 3d. 484, 411 N.E.2d 910 (1980) (intentional conduct or conduct exhibiting a reckless disregard for safety of others or failure to exercise ordinary care in the face of impending danger); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981) (flagrant indifference to unreasonable risk of harm); Shortle v. Central Vermont Public Service Corp., 137 Vt. 32, 399 A.2d 517 (1979) (actual malice or reckless or wanton disregard of another's rights).

[26] Indeed, the lack of comprehensive guidelines has raised questions as to whether imposition of punitive damages is consistent with due process. Although punitive damages are "quasi-criminal" in nature, "their imposition is unaccompanied by the types of safeguards present in criminal proceedings." *See* Smith v. Wade, 461 U.S. at 59 (Rehnquist, J., dissenting); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983).

The detrimental impact of this state of affairs on employee benefit plans is self-evident. In the absence of uniform standards, punitive damages awards are likely to fall unevenly upon fiduciaries, depending upon the jurisdiction in which they reside. Moreover, federal courts may assess punitive damages by reference to state law, further aggravating the uneven impact of such assessments. Finally, even assuming that a single workable standard could be developed, the broad discretion accorded to the trier of fact to set the amount of punitive damages must inevitably lead to inconsistent results, which cannot be squared with Congress' emphasis in ERISA on predictability and uniformity. *See, e.g., International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 50; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting).

When viewed in this context, the possible benefit of punitive awards pales considerably. Punitive damages, of course, serve no compensatory purpose, but represent mere windfalls to prevailing plaintiffs. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 50; *Smith v. Wade*, 461 U.S. at 49. As the court below recognized, they are designed to punish reprehensible conduct and to deter its future occurrence. *Silkwood v. Kerr-McGee Corporation*, 104 S. Ct. 615, 628 (1984); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 266; *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350.

Such "punishment" of errant fiduciaries, however, is hardly essential to further the policies underlying ERISA. As discussed above, these fiduciaries generally are uncompensated for their services and bear no financial stake in the outcome of benefits disputes. Thus, they have little motive to act other than in the best interest of the participants and beneficiaries of the plans they serve. Moreover, they are already subject to a wide range of statutory and regulatory remedies more than

adequate to deter misconduct on their part. Those remedies, as noted earlier, include personal liability for losses to the plan arising from a breach of fiduciary duty, civil penalties, removal, and imposition of criminal sanctions. *See* pp. 15 to 23, *supra*. Further, in circumstances involving gross misconduct, fiduciaries can be compelled to pay attorneys' fees and costs incurred by participants in benefits cases. *See* ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1) (1982). Under these circumstances, whatever marginal benefit there might be in subjecting fiduciaries to liability for punitive damages is too insubstantial to justify the disruption of orderly employee benefit plan administration that would inevitably follow.

III. FOR SIMILAR REASONS, THE COURT SHOULD REVERSE THE NINTH CIRCUIT'S HOLDING ON EXTRA-CONTRACTUAL DAMAGES

For much the same reasons, the Ninth Circuit's holding that extra-contractual compensatory damages are available to plan participants under Section 409 should be reversed. As in the case of punitive damages, this ruling finds no support in the plain language of Section 409 which authorizes relief only on behalf of the plan itself, and not on behalf of plan participants or beneficiaries. Moreover, the legislative history of ERISA nowhere suggests an intent on the part of Congress to provide damages for pain and suffering or other consequential relief arising out of a denial of benefits. Rather, that history evidences an intention to provide solely equitable remedies, in accordance with the law of trusts. *See* pp. 17 to 18, *supra*.

Further, the Ninth Circuit's ruling would produce results that are directly contrary to Congress' statutory scheme. As noted earlier, in ERISA Section 502(a)(1)(B), Congress extended participants and beneficiaries a cause of action based on their individual plan rights under which they could recover any benefits due them under

a plan, or enforce or clarify their rights to such benefits. In view of these express limitations on the types of relief authorized, the courts have held that extra-contractual damages, such as damages for pain and suffering or emotional distress, are not available under Section 502(a)(1)(B). *See Bitner v. Sadoff & Rudoy Industries*, 728 F.2d at 824; *Hurn v. Retirement Fund Trust of Plumbing Industries*, 424 F. Supp. 80 (N.D. Cal. 1976). Nonetheless, under the Ninth Circuit's ruling, such damages would be routinely awarded under Section 409 of ERISA whenever a participant could demonstrate that a plan had failed to use "reasonable care" in processing his claim for benefits. Pet. App. at 12a. Indeed, a participant would be entitled to such recovery even where an initial benefit denial was corrected in the internal appeals process. Such a result not only flies in the face of the express limitations on relief set forth in Section 502(a)(1)(B), but it would render them virtually meaningless.[27]

The Ninth Circuit's decision on extra-contractual relief also would have many of the same adverse effects upon proper plan administration described in connection with punitive damages. Just as in the case of punitive damages, the availability of extra-contractual relief would serve as a disincentive to the internal resolution of benefits claims disputes. Similarly, the prospect of potential personal liability for such matters as pain and suffering

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[27] Likewise, in analogous statutes under Title VII and the Age Discrimination in Employment Act, the courts have refused to allow damages for pain and suffering and other consequential relief. *See, e.g.*, Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982); Hensen v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Padway v. Palches, 665 F.2d 965 (9th Cir. 1982); Shah v. Mt. Zion Hospital and Medical Center, 642 F.2d 268 (9th Cir. 1981); Johnson v. Al-Tech Specialties Steel Corp., 731 F.2d 143 (2d Cir. 1984); Hill v. Spiegel, Inc., 708 F.2d 233 (6th Cir. 1983); Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir.), *cert. denied*, 439 U.S. 1039 (1982).

and emotional distress may deter many qualified individuals from serving as ERISA fiduciaries. Indeed, this consequence may be even more severe in connection with extra-contractual damages since the Ninth Circuit's ruling, in effect, would make such relief automatic where a participant suffers consequential harm while his claim was under review.

Lastly, the availability of such relief would have much the same adverse impact on responsible plan decision-making as an award of punitive damages. It would encourage plan fiduciaries to place their own interests in avoiding personal liability above those of the plan when considering claims. Moreover, since fiduciaries would face potential liability for any harm suffered due to delay in resolving a participant's claim—even that inherent in the appeals process—it would encourage fiduciaries to place a premium upon speed at the expense of the thorough, deliberate consideration of benefit claims contemplated by ERISA.

Once again, the Court need look no further than this case for an illustration of these points. Here, respondent is seeking damages for economic loss and emotional distress caused by a benefit claims dispute ultimately resolved in her favor. None of her losses, however, are in any way related to the alleged 12 day delay in resolving her appeal. Russell's alleged economic loss—the cash out of her husband's retirement plan—occurred on December 17, 1979, less than 60 days after Russell's October 22, 1979 letter was received by the plan. Similarly, her alleged "mental and emotional" distress occurred long before the 120 day appeal period had expired. Absent some extraordinary degree of prescience, the fiduciaries to the plan could have no means of foreseeing that respondent faced such peculiar problems. Under the Ninth Circuit's ruling, however, if the initial denial of her benefits claim was in error, these same fiduciaries could be held strictly accountable for any damages which occurred while the appeal of the denial of benefits was under review.

Finally, the same proliferation of litigation in general, and federal court litigation in particular, can be anticipated if the decision below is permitted to stand. Participants and beneficiaries, confronted with the opportunity to recover such consequential damages would have little incentive to resolve their claims short of litigation. Moreover, any participant or beneficiary whose claim for benefits was denied on appeal inevitably would join its action under Section 502(a)(1)(B) with an action under Section 409 seeking such compensatory relief, thus insuring, contrary to Congress' legislative purpose, that all such litigation is brought in federal court.[28] Accordingly, just as the availability of punitive damages under ERISA cannot be sustained, so too the Court should declare extra-contractual damages unavailable as a matter of law.

CONCLUSION

For the foregoing reasons, the ruling of the Ninth Circuit should be reversed.

Respectfully submitted,

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November 15, 1984

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[28] As in the case of punitive damages, claims for extra-contractual damages under § 409 cannot be pursued by a participant or beneficiary in a action pursuant to § 502(a)(1)(B), the *only* type of ERISA action that may be brought in state court. Rather, they must be pursued under ERISA § 502(a)(2) over which the federal courts have exclusive jurisdiction. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (1982).

No. 84-9 (16)

In the Supreme Court

OF THE

United States

October Term, 1984

Massachusetts Mutual Life Insurance Company,
and Cecilia Stevenson,
Petitioners,
vs.
Doris Russell,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF OF THE BOARDS OF TRUSTEES OF THE NORTHERN CALIFORNIA CARPENTERS TRUST FUNDS, CEMENT MASONS TRUST FUNDS, LABORERS TRUST FUNDS, OPERATING ENGINEERS TRUST FUNDS AND CONSTRUCTION TEAMSTERS HEALTH AND WELFARE TRUST FUND AS AMICI CURIAE IN SUPPORT OF THE POSITION OF PETITIONERS

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary of an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of a benefit claim.

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No. 84-9

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CECILIA STEVENSON,
Petitioners,

vs.

DORIS RUSSELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE BOARDS OF TRUSTEES OF THE NORTHERN CALIFORNIA CARPENTERS TRUST FUNDS, CEMENT MASONS TRUST FUNDS, LABORERS TRUST FUNDS, OPERATING ENGINEERS TRUST FUNDS AND CONSTRUCTION TEAMSTERS HEALTH AND WELFARE TRUST FUND AS AMICI CURIAE IN SUPPORT OF THE POSITION OF PETITIONERS

This brief amici curiae is filed by the Boards of Trustees of the Northern California Carpenters Trust Funds, Cement Masons Trust Funds, Laborers Trust Funds, Operating Engineers Trust Funds and Construction Teamsters Health and Welfare Trust Fund (The "Northern California Trust Funds")[1] with the consent of all parties. Letters from counsel for the petitioners and respondent giving such consent have been filed with the Clerk of the Court.

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[1]The Northern California Trust Funds were all established under collective bargaining agreements through negotiations between contractor and builder associations and building trades unions to cover basic tradesmen performing work in the building and construction industry within the 46 Northern Counties of California. They presently consist of five health and welfare funds, four pension funds, two annuity funds, four vacation and holiday funds and two apprenticeship and training funds as follows: The Carpenters Health and Welfare Trust Fund for California, the Carpenters Pension Trust Fund for Northern California, the Carpenters Vacation and Holiday Trust Fund for Northern California, the Carpenters Annuity Trust Fund for Northern California, the 46 Counties Millwrights Annuity Trust Fund, the Cement Masons Health and Welfare Trust Fund for Northern California, the Cement Masons Pension Trust Fund for Northern California, the Cement Masons Vacation/Holiday Trust Fund for Northern California, the Cement Masons Apprenticeship and Training Trust Fund for Northern California, the Laborers Health and Welfare Trust Fund for Northern California, the Laborers Pension Trust Fund for Northern California, the Laborers Vacation-Holiday Trust Fund for Northern California, the Laborers Training and Retraining Trust Fund for Northern California, the Operating Engineers Health and Welfare Trust Fund, the Pension Trust Fund for Operating Engineers, the Pensioned Operating Engineers Health and Welfare Trust Fund, the Operating Engineers and Participating Employers Pre-Apprentice, Apprentice and Journeymen Affirmative Action Training Fund and the Construction Teamsters Health and Welfare Trust Fund for Northern California.

THE NATURE OF THE NORTHERN CALIFORNIA TRUST FUNDS AND OF THEIR INTEREST IN THIS CASE

The Northern California Trust Funds are collectively-bargained multiemployer employee benefit funds established and maintained pursuant to Section 302(c)(5) and (6) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c), (5), (6). Each of the Funds is an employee benefit plan covered by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq., commonly known as ERISA.

The Funds, in the aggregate, have over 90,000 participants, who are employees engaged in the building and construction industry in the 46 Northern Counties of California, and over 5,000 contributing employers, who are also engaged in that industry. Each of the Funds is governed by a Board of Trustees composed of an equal number of employer representatives and employee representatives, each of whom serves without compensation from the Funds. The members of each Board have been designated as named fiduciaries who jointly have authority to control and manage the operation and administration of the employee benefit plan maintained by the Fund. One of the duties of the Board in the exercise of this authority is to receive and consider claims to benefits under the plan and to grant or deny such claims.

Because of the special characteristics of multiemployer employee benefit plans in the construction industry, the holding of the Court of Appeals in this case that a fiduciary of a plan may be held personally liable to a plan participant for punitive damages or extra-contractual compensatory

relief for the improper or untimely processing of his claim has a particularly devastating impact upon such a plan. The trustees of the plan who serve as employer representatives do so more out of dedication to the industry than out of their self-interest or the special interests of their employers. The contractors and builders who participate in the plan number in the thousands, and the easy course for a contributing employer would be to let someone else undertake the burdens and responsibilities of representing the employers on the boards of trustees.

Ever since the first of the Northern California Funds were established in 1953 the employer associations that negotiate and renegotiate the collective bargaining agreements providing for the Funds have, as a general policy, appointed leading contractors or builders, or principal officers of leading contractor or builder firms, as employer trustees of the Funds. This policy has meant that those who, through their leadership positions, have been familiar with the interests and positions of the contributing employers, including those relating to collective bargaining, have been truly representative of such employers within the meaning of Section 302(c)(5) of the Labor-Management Relations Act. The policy has contributed substantially to the growth and well-being of the Funds, which now receive annually more than $350,000,000 in employer contributions, distribute more than $320,000,000 in benefits to participants and their dependents and beneficiaries and have accumulated more than $1,700,000,000 in reserves for future pension and other benefits. The policy, however, has become increasingly difficult to maintain because of the reluctance of potential appointees to expose themselves and their families to the risk of personal liability.

While the trustees can be provided with insurance against personal liability for extra-contractual compensatory relief, no insurance can be provided in California against liability for punitive damages. Further, and of more immediate concern to every trustee, is that a simple allegation and claim for punitive damages has been held by the federal courts to authorize an inquiry for discovery purposes into the net worth and personal finances of a defendant.

In *Hughes v. Groves* (W.D. Mo. 1969) 47 F.R.D. 52, the Court said (p. 55):

> "Defendant next objects to plaintiff Robert Hughes' interrogatory 7 and Margaret Hughes' interrogatory 18, both of which in substance ask for 'all assets and liabilities, jointly and severally * * * and gross earnings for last five (5) years.' Defendant objects that the question is premature. **He asserts that 'more than a simple allegation and claim for punitive damages should be necesary to allow plaintiffs to discover information about defendant's finances and 'how much he is to be punished.' " The law, however, is well settled and contrary to that position.** Information regarding damages is as discoverable as is that which pertains to liability. 4 Moore's Federal Practice § 26.18, p. 1229 (1968 ed.); *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 53 S.Ct. 746, 77 L.Ed. 1440. **No prima facie showing in punitive damages is required to justify discovery."[2]**
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> See: *Miller v. Doctor's General Hospital* (W.D. Okla. 1977) 76 F.R.D. 136, 140; *Holliman v. Redman Development Corp.* (D.S.C. 1973) 61 F.R.D. 488, 491; *Coy v. Superior Court* (1962) 58 Cal.2d 210, 216-217, 23 Cal. Rptr. 393, 373 P.2d 457.

[2]Emphasis is added throughout this brief unless otherwise noted.

Some of the adverse consequences of the ruling in *Hughes v. Graves, supra,* were expressed in *Richards v. Superior Court* (1978) 86 Cal.App.3d 265, 150 Cal. Rptr. 77, where Court said (p. 271):

> "Discovery seeking financial information by reason of a claim for punitive damages is one classic instance of the manner in which civil discovery is used to achieve a litigation advantage never contemplated when the methodology was introduced into pretrial procedure. **Causes of action for punitive damages have become very easy to allege.** (See, e.g., *Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980.) Response to discovery seeking financial information places a severe burden on the responder. As a minimum, there is the time and expense necessary to the compilation of a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damages which may never be awarded. In addition, there is usually the potential that untoward disclosure of the information obtained may in some way or other react adversely against the disclosing party for reasons totally unrelated to the lawsuit. The possibilities run all the way from greater exposure to the not so gentle solicitations of some charitable organizations **to the possibility of damage to the discloser in the competitive business arena.**"
>
> See: Note, *Pretrial Discovery of Net Worth in Punitive Damage Cases* (1981) 54 So. Cal. L. Rev. 1141.

If the improper or untimely processing of a claim for benefits could expose a fiduciary of an ERISA plan to personal liability for punitive damages, the denial of such a claim could *a fortiori* expose the fiduciary to such liability. ERISA requires that the boards of trustees of the North-

ern California Funds assume responsibility for the granting or denial of claims to benefits from the Funds, and at practically every meeting of the boards of the Pension Funds and the Health and Welfare Funds particularly, the boards must decide appeals from the administrative denial of claims. ERISA also requires that the decisions on these appeals be solely in the interests of the participants and beneficiaries of the plans and in accordance with the documents and instruments governing the plans insofar as the documents and instruments are consistent with ERISA (ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)).

The claims that have been denied have already been carefully screened administratively under these guidelines so that inevitably many of the appeals must be rejected. An individual trustee who has been required to participate in these difficult decisions and who knows that any disappointed claimant may file an action against him personally in a federal district court and by a simple allegation and claim for punitive damages obtain the right to inquire into his personal financial affairs could not be blamed if he resigned from his trusteeship, and a potential trustee could not be blamed for declining to serve under such unrealistic and unjust legal rules (see *Fentron Industries v. Shopmen's Pension Fund* (9th C.A. 1982) 674 F.2d 1300, 1305).

Further, the basis advanced for imposing personal liability upon the individual trustees, namely, the failure after Board review of a claim is first requested, to render a decision on the claim within the time periods prescribed by the Secretary of Labor would, in many situations, make a travesty of the claims review procedure in the context of a large multiemployer plan. The trustees have no control over the time when a claimant requests Board review of his

claim and claimants can, and frequently do, make such requests before their claims have been fully processed. The vast majority of claims either clearly qualify for benefits under the terms of the plan or clearly do not qualify, and are routinely granted or denied accordingly within the prescribed time periods. It is the marginal claim—the claim that does not qualify upon the evidence initially submitted but which might qualify if further evidence were obtained—that sometimes requires a Board decision to be delayed beyond the prescribed period. In these circumstances, under the holding of the Court of Appeals in this case, the Board's fiduciary duty to administer the plan in accordance with its terms would require that it deny the claim within the prescribed period in order to avoid imposing personal liability upon the Trustees for having failed to make a timely decision.

The interest of the Northern California Funds in this case is to acquaint the Court with the special concerns of multi-employer construction industry employee benefit plans and to urge the Court to reverse these unrealistic and unjust legal rules. In so doing they hope to preserve, for the benefit of the participants and beneficiaries, Funds which have been built up to their present importance over a period of 30 years, which have been well run for all of that period, and which Congress did not intend to cripple or destroy when it enacted ERISA.

SUMMARY OF ARGUMENT

The holding of the Court of Appeals that a plan participant may sue the fiduciary of the plan for punitive damages or extra-contractual compensatory relief because of the improper or untimely processing of his benefit claim was based on an uncritical and erroneous reading of the legislative history of ERISA. When that history is correctly read it compels the conclusion that Congress intended to limit the civil enforcement remedies provided by ERISA to the more flexible and less draconic remedies developed by courts of equity.

This conclusion is confirmed by the fact that Congress provided in ERISA for a claims review procedure and made plan fiduciaries primarily responsible for establishing and operating the procedure. Congress must have intended to protect the fiduciaries from harassment or intimidation in connection with the exercise of this responsibility. Further, the procedure was intended to provide an expeditious and relatively inexpensive method of resolving benefit disputes. Both of these objectives would be defeated by the complication, delay, expense, harassment and risk connected with the assertion and litigation of claims for punitive damages or extra-contractual compensatory relief.

ARGUMENT

Congress Did Not Intend by the Enactment of ERISA to Subject a Fiduciary of a Covered Employee Benefit Plan to an Action for Punitive Damages or Extra-Contractual Compensatory Relief by a Plan Participant Who Alleges that the Fiduciary Has Processed His Claim in an Improper or Untimely Manner or Has Arbitrarily and Capriciously Denied His Claim for Benefits.

The Court of Appeals, in ruling that a plan participant may sue the fiduciary of the plan for punitive damages or extra-contractual compensatory relief because of the alleged improper or untimely processing of his claim, relied upon statements in Congressional committee reports that the committees intended to provide both the Secretary of Labor and plan participants and beneficiaries with "the full range of legal and equitable remedies available in both state and federal courts" (722 F.2d 491). The last version of the bill which ultimately became ERISA to contain language supporting these sweeping statements, however, was H.R. 2 as passed by the Senate on March 4, 1974, which provided in Section 693 that "[c]ivil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary . . . may be brought by any participant or beneficiary of any employee benefit plan or fund subject to the Welfare and Pension Plans Disclosure Act in any court of competent jurisdiction, State or Federal, . . . (Legislature History of the Employee Retirement Income Security Act of 1974, Public Law 93-406, prepared by the Sub-Committee on Labor of the Committee on Labor and Public Welfare, United States Senate, April, 1976, Vol. III, pp. 3599, 3816-3817.[3]

[3]Hereafter referred to as "Legis. Hist."

The sweeping language of Section 693 was drastically changed in ERISA as finally enacted. The only action that ERISA permits to be brought in a State court is an action by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan" (Section 502(a)(1)(B)). All other actions must be brought in the federal courts and actions by a participant or beneficiary or the Secretary of Labor to redress violations of the Act are expressly limited to actions to obtain injunctive "or other appropriate *equitable* relief" (Sections 502(a)(3) and (a)(5)).

The provisions of Section 502(a)(3) and (a)(5) make it impossible, we submit, to distill from the provisions of Section 502(a)(2) an intention on the part of Congress to provide to the Secretary and participants and beneficiaries the "full range of legal and equitable remedies available in both state and federal courts" which Section 693 of H.R. 2 would have provided. The only possible conclusion from the terms of the Act as passed is that Congress deliberately intended to limit the civil enforcement remedies provided by the Act to the more flexible and less draconic remedies developed by courts of equity.

This conclusion is confirmed by the legislative history of ERISA. ERISA § 503, 29 U.S.C. § 1133, and regulations issued pursuant to that Section, require that a plan establish a reasonable claims procedure which provides for a full and fair review by the plan fiduciary of a decision denying a claim. The genesis of this provision was explained in the Conference Report on H.R. 2, Rep. No. 93-

1280, 93d Cong., 2d Sess., at p. 328 (Legis. Hist., p. 4595) as follows:

"*Benefit Claim Procedure.*—The bill as passed by the House contains no provisions providing for procedures for resolving disputes between the plan administrator and participants or beneficiaries. Under the bill as passed by the Senate each pension plan is required to establish a procedure for a review of disputes between the plan administrator and participants or beneficiaries and afford an opportunity for arbitration of any dispute. Under the conference agreement every employee benefit plan is required to provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for denial written in a manner calculated to be understood by the participant. In addition, the plan administrator is required to afford a reasonable opportunity to any participant or beneficiary whose claim for benefits has been denied for a full and fair review of this decision by the plan administrator."

The purpose of the provision, and the reason for its final form, were explained by Senator Javits as follows (Legis. Hist., p. 4769):

"The Senate bill provided that each plan was to incorporate a procedure for arbitration of benefit claim disputes between the plan and participants and beneficiaries. The House bill contained no comparable provision. **House conferees were opposed to the Senate provision on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes, and at their insistence it was dropped in conference.** I regret this decision since I believe the Senate bill would have provided a relatively inexpensive way for the resolution of minor benefit disputes for the many participants and beneficiaries who lack the resources to pursue their claims through the courts. Nevertheless, I am encouraged that the conferees agreed to direct the Joint Pension Task Force to study the feasibility of this approach, and **by the acceptance of provisions contained in the original Williams-Javits bill that would require a full and fair claims procedure—Section 503—as well as the provisions authorizing the Secretary of Labor to enforce benefits denied in violation of law—Section 502(b).**"

In the light of this legislative history the Courts have construed Section 503 as requiring that a plan participant or beneficiary whose claim to benefits has been denied exhaust the plan's claims review procedure before resorting to the courts (*Amato v. Bernard* (9th C.A. 1980) 618 F.2d 559; *Challenger v. Local Union No. 1 of the International Bridge, Structural and Ornamental Ironworkers* (7th C.A. 1980) 619 F.2d 645; *Taylor v. Bakery & Confectionary Union & Industry International Welfare Fund* (E.D.N.C. 1978) 455 F. Supp. 816, 820).

In *Taylor, supra,* the Court said (455 F. Supp. at pp. 819-820):

"An examination of the underlying ERISA policies, interpreted analogously to the development of federal law under LMRA § 301, leads the court to conclude that Congress intended a claimant to exhaust his interfund remedies before seeking federal court review (with two exceptions noted infra). First, Section 1133 of the Act specifically requires the establishment of claims procedures, and the Secretary of Labor, pursuant to 29 U.S.C. § 1135, has promulgated extensive guidelines to implement these procedures. **Much like the labor grievance system, this claim/appeals mechanism is de-**

signed to reduce frivolous claims, promote the consistent treatment of claims, and create a non-adversarial method of claims settlement. CF. Vaca v. Sipes, 386 U.S. 171, 191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

Tied to these inter-fund claims procedures was Congress' awareness of the potential costs of pension reform, and **it sought to 'strike a balance between providing meaningful reform and keeping costs within reasonable limits.'** [1974] U.S. Code Cong. & Admin. News, pp. 4670, 4682. Congress was particularly concerned with outlining a private insurance system that would operate efficiently, thereby increasing its acceptance and institution among American business. U. S. Code News, supra. **If claimants were allowed to litigate the validity of their claims before a final trustee decision was rendered, the costs of dispute settlement would increase markedly for employers.** Employees would also suffer financially because, rather than utilize a simple procedure which allows them to deal directly with their employer, they would have to employ an attorney and bear the costs of adversary litigation in the courts.

Finally, the broad managerial discretion granted trustees under the ERISA statutory provisions indicates **a Congressional intent that they be primarily responsible for establishing and operating the claims procedures.** See Hines v. Anchor Motor Freight, Inc. 424 U.S. 554, 562-64, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976) (LMRA § 301, grievance procedure contest)."

In *Amato, supra,* the Court cited with approval the reasoning of *Taylor* and then added (618 F.2d at pp. 567-568):

"Moreover, the trustees of covered benefit plans are granted broad fiduciary rights and responsibilites under ERISA, sections 401 through 414, 29 U.S.C. §§ 1101-1114, and implementation of the exhaustion requirement will enhance their ability to expertly and efficiently manage their funds **by preventing premature judicial intervention in their decision-making processes.** The text of ERISA and the policies underlying that text, far from suggesting that Congress intended to abrogate the exhaustion requirement in the case of suits under ERISA or that sound policy would counsel its abrogation by the courts, suggest just the opposite.

Finally, a primary reason for the exhaustion requirements, here as elsewhere, is that prior **fully considered actions by pension plan trustees interpreting their plans and perhaps also further refining and defining the problem in given cases, may well assist the courts when they are called upon to resolve the controversies.** *Cf. Buzzard v. Local Lodge 1040 Int. Ass'n of Mach. & Aero. Wrkrs., supra,* 480 F.2d at 41."

And in *Challenger, supra,* the Court added (619 F.2d at p. 649):

In addition, we note that Congress intended fund trustees to have primary responsibility for claim processing, as evidenced by the specific requirement in § 503, 29 U.S.C. § 1133, of a claim and appeal procedure for every employee benefit plan. **To make every claim dispute into a federal case would undermine the claim procedure contemplated by the Act. It would also burden employee benefit funds with substantial expense.** *See Taylor v. Bakery & Confectionery Union & Industry International Welfare Fund,* 455 F.Supp. 816, 820 (E.D.N.C. 1978). We believe that Congress, in adopting ERISA, did not require or contemplate such a result."

Further emphasizing the importance of the trustees' decision-making process to the administration of ERISA, the Courts—including the Court of Appeals for the Ninth Circuit—have held that the final decision of the trustees on a benefit claim can be set aside in a court proceeding only if the plaintiff alleges and proves that the decision was arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law (*Rehmar v. Smith* (9th CA 1976) 555 F.2d 1362, 1371; *Music v. Western Conference of Teamsters Pension Trust Fund* (9th CA 1983) 714 F.2d 413, 418). They have held, further, that where a claim to eligibility is involved, "[a] federal court is to focus on the evidence before the trustees at the time of their final decision and is not to hold a de novo factual hearing on the question of the applicant's eligibility," and that "[a]s a general matter the court should not resolve the eligibility question on the basis of evidence never presented to a pension fund's trustees but should remand to the trustees for a new determination" (*Wardle v. Central States, Southeast and Southwest Areas Pension Fund* (7th CA 1980) 627 F.2d 820, at p. 824; *Malhiot v. Southern California Retail Clerks Union* (9th CA 1984) 735 F.2d 1833, 1835).

Congress, having made plan fiduciaries primarily responsible for establishing and operating the claims procedures and deciding disputed questions of eligibility for benefits, must certainly have intended to protect those fiduciaries from harassment or intimidation in connection with the exercise of that responsibility. This Court has not hesitated to recognize and enforce such protection for decision-makers in comparable contexts and for comparable reasons (see *Butz v. Economu,* 438 U.S. 478, 511-517, 98 S.Ct. 2894, 2913-2916 (1978); *Briscoe v. Lahue,* 460 U.S. 325, 103 S.Ct.

1108, 1120 (1983); c.f *International Union, UAW v. Greyhound Lines, Inc.* (6th C.A. 1983) 701 F.2d 1181, 1187). The reasoning of these cases leads to the conclusion that Congress could not have intended to impose personal liability for punitive damages or extra-contractual compensatory relief upon plan fiduciaries for action taken in the operation of the claims procedure, since the threat of such liability disrupts the reasoned decision-making which Congress considered essential to ERISA. Protection from the threat of personal liability, and the harassment connected with suits to enforce such liability, promotes the interest of all plan participants and beneficiaries in the uniform and impartial application by plan fiduciaries of the terms of the plan, while the right of an individual participant or beneficary to sue for enforcement of his rights under the plan (ERISA § 502(a)(1)(B)) and to seek the assistance of the Secretary of Labor in enforcing participation, vesting and funding rights (ERISA § 502(b)), provides ample protection against abuse of the decision-making function in individual cases (*Cf. Nixon v. Fitzgerald,* 457 U.S. 731, 757, 102 S.Ct. 2690, 2706 (1983).

Further, the holding that fiduciaries may be held personally liable for punitive damages, even under the limited circumstances the Court of Appeals deemed "appropriate", inevitably complicates the court review of the decisions of plan fiduciaries and increases the time and expense of such review, thereby defeating one of the other important objectives of the claim review procedures. As noted above, in order to prevail in an action to secure court review of the decision of a plan fiduciary denying a claim to benefits, the plaintiff must allege and prove that the decision was arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law. By

naming the fiduciary as a defendant individually and including in his complaint a prayer for punitive damages and an allegation that the fiduciary also acted "with actual malice or wanton indifference to [his] rights", plaintiff can pursue not only the merits of his claim for benefits but also discovery as to the personal financial resources of the fiduciary and the issue as to whether or not the fiduciary should be punished for having denied his claim. Thus, a process which was intended by Congress to provide an expeditious and relatively inexpensive method of resolving benefit disputes would be converted into costly, drawn-out, highly adversarial litigation which would include issues unrelated to the merits of the plaintiff's claim to plan benefits. We submit that both the terms of ERISA and the legislative history of the Act make clear that Congress did not intend such a result.

Finally, the conclusion of the Court of Appeals that the failure to render a decision on a benefit claim within the time limits prescribed by the Secretary of Labor subjects a plan fiduciary to personal liability for punitive damages or extra-contractual compensatory relief is not supported by the regulation on which the court relied. The consequences of such a failure are spelled out in the regulation, 29 C.F.R. § 2560.503-1, as follows: If a plan does not notify a claimant of the denial of his claim within the prescribed time limit for such notice, "the claim shall be deemed denied and the claimant shall be permitted to proceed to the review stage described in paragraph (g) of this section" (§ 2560.-503-1(e)(2)). If the decision of the trustees on review is not furnished to the claimant within the prescribed time limit for the decision, "the claim shall be deemed denied on review" (§ 2560.501-1(4)). At this point the claimant may

seek court review of the merits of his claim, but he need not do so, and it there is a possibility that continued review proceedings may result in the allowance of his claim, as happened in respondent's case, the normal claimant would not be likely to do so. In any event, the general rule is that the specification of one remedy excludes another (*Switchmen's Union of N.A. v. National Mediation Board*, 320 U.S. 297, 301, 64 S.Ct. 95), and nothing in the terms or the purpose of the regulation, or of ERISA § 503, justifies a departure from this rule.

CONCLUSION

Multiemployer ERISA plans are today beset with major problems—enforcement of withdrawal liability, hospital and medical cost containment, affirmative action, etc.—which require the attention, abilities and judgment of responsible leaders in the respective industries served by the plans. The addition to these problems of the intimidation and harassment inherent in the punitive damage remedy threatens to deprive the plans of the services of the fiduciaries who are best able to resolve the problems, and defeats the objective of ERISA to promote the growth and prosperity of covered plans. The holding of the Court of Appeals in this case should be reversed.

Respectfully submitted,

San Francisco, California,
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No. 84-9

In The

Supreme Court of the United States

October Term, 1983

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CECILIA STEVENSON,

Petitioners,

vs.

DORIS RUSSELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE PIPE TRUST, IBEW-NECA TRUST, AIRCONDITIONING TRUST, AND FLOOR COVERING TRUST IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

It is, undoubtedly, common practice for litigants to sound alarums before this Court in hope of persuading the Court that their cause, among all other causes, is worthy of the Court's attention. We refuse to dissemble this Court by urging that lives may hang in the balance upon the instant cause, or that it rises to the level of

eliciting some grave constitutional pronouncement. At the same time, and at the risk of being classed with those who would cry wolf, this Court should not remain unsuspecting about the grave consequences which will surely attend the ruling of the Court of Appeals: An enterprise carefully nurtured since its infancy with Congressional succor, and just now achieving its maturity, will cease to be in any form remotely approaching its historical persona. The Amici Curiae have been and hope to remain a part of that enterprise.

Pursuant to Rule 36.2 of the Rules of this Court, and with the written consent of the parties, this Brief is filed jointly on behalf of four Trust Funds: The Southern California Pipe Trades Trust Funds ("Pipe Trust"), The Southern California IBEW-NECA Trust Funds ("IBEW-NECA Trust"), the Airconditioning and Refrigeration Industry Trust Funds ("Airconditioning Trust"), and The Southern California Floor Covering Trust Funds ("Floor Covering Trust"), hereinafter sometimes referred to collectively as the "Trust Funds." By an Order entered October 1, 1984, this Court previously granted, *inter alia,* the Motion of these Amici Curiae for leave to file a brief in support of granting a petition for a writ of certiorari in the instant matter. The petition was granted by an Order entered on the same date.

Each of these Amici Curiae Trust Funds is situated in California and was created as a result of collective bargaining on a multiemployer basis between labor and management. Thus, for example, the Pipe Trust was created in about 1957 as a result of collective bargaining between the Southern California Pipe Trades District Council No. 16 of the United Association for and on be-

half of its affiliated local unions and the precessor multiemployer association to the Plumbing & Piping Industry Council. The IBEW-NECA Trust, as another example, was created in about 1965 as a result of collective bargaining between Local Union No. 11 International Brotherhood of Electrical Workers, AFL-CIO, and the Los Angeles County Chapter, National Electrical Contractors Association. Each of these Trust Funds, under separate trust indentures, provides both health and welfare benefits and pension benefits to tens of thousands of eligible participants. Each of the Trust Funds is also an "employee benefit plan," within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1002(3), and is, therefore, regulated by ERISA.

In addition to being regulated by ERISA, each of these Trust Funds is a so-called "Taft-Hartley" trust fund, meaning that each was created under the aegis of Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. Section 186(c)(5). Section 302(c)(5), among other things, requires and has always required, that "employees and employers [be] equally represented in the administration" of Taft-Hartley pension and health and welfare funds. *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329 (1981). Pursuant to this statutory mandate, the labor organizations and employers who created the instant Trusts have historically appointed their respective representatives to serve as trustees on these Trusts.

There are, and have been, 14 such Trustee representatives on the Pipe Trust, 14 on the IBEW-NECA Trust (pension), 6 on the Airconditioning Trust, and 6 on the Floor Covering Trust. Each of these Trustees is a fidu-

ciary within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A). These Trustee representatives are not professionals, in the sense of receiving compensation for serving in the capacity of Trustee or even in the sense of devoting a full-time effort to the position of Trustee. On the contrary, almost all Trustees are employed full-time elsewhere, either by a participating labor organization or by a contributing employer. Accordingly, their service to the respective Trust Funds as Trustee is on a volunteer basis and arises out of their personal commitment to better the industry. The position of Trustee, is, by its nature, a part-time position, carried out in addition to duties and responsibilities elsewhere. While the position is part-time, the Trustees nonetheless carve out of their working life an enormous amount of time and energy to devote to this volunteer effort. Thus, each Trustee devotes in excess of 40 hours per month to the affairs of the Trust Funds, preparing for and attending meetings of the Trustees as a whole, as well as various committee meetings such as administrative, delinquency, appeals, investment (or finance), and building committees.

The Court of Appeals held that, under ERISA, a fiducary is personally liable for punitive damages and extra-contractual compensatory relief in actions brought by plan participants arising out of claims for benefits. These Amici Curiae are vitally interested in the outcome of this matter, since, under the direction of the Trustees, the Trust Funds annually handle hundreds of thousands of claims for benefits by participants and their dependents. During the 1983 calendar year, the Pipe Trust received *259,328* health and welfare claims and *339* pen-

sion applications; the Airconditioning Trust received *45,844* health and welfare claims and *35* pension applications; and the Floor Covering Trust received *8,751* health and welfare claims and *45* pension applications. During the 1983-4 fiscal year, the IBEW-NECA Trust received *141,909* health and welfare claims and *304* pension applications. Therefore, during a 12-month period, these four Trust Funds alone processed a total of 455,832 health and welfare claims and received 723 pension applications. Not all of these applicants and claimants, of course, are happy with the manner in which their claim or application is processed. There can be no doubt that the promise of punitive damages and extra-contractual compensatory relief held out by the Court below will inspire or induce a greater proportion of these unhappy claimants to seek judicial relief, most likely in federal court. [illegible]y one-tenth of one percent of these claims give ris[illegible] litigation, the courts will be flooded with over 4[illegible]nts per year with respect to these four Trust Funds alone. Moreover, the personal assets of volunteer trustees will be exposed many times over. This is not by any means an idle fear: Following on the heels of the publication of the Court of Appeals opinion, the Pipe Trust was served with a summons and complaint in a case encaptioned *Louis Moot v. Retirement Fund Trust, etc., et al.*, CIV No. 843411 HLH (C.D. Cal.) in which 13 of the Pipe Trust's Trustees are named as individual defendants. The plaintiff, who alleges that he was improperly denied certain benefits, seeks damages for "physical and mental pain and suffering" in the sum of $125,000 and punitive damages "in a sum equal to 25% of the net worth of each defendant." The Amici Curiae, therefore, have a plain and immediate interest in the outcome of this case.

They are not alone. According to a recent report by the Comptroller General, there are 1,924 multiemployer trusts nationwide which have a minimum of 100 participants. In total, there are almost 8½ million participants in these 1,924 trusts. Comptroller General of the United States, Report to the Congress, GAO/HRD-84-1, at 8(1984). Assuming the claims experience of these trusts is not dissimilar to that of the Amici Curiae, the federal courts nationwide will likely enjoy an annual influx of thousands of benefit claims cases if the opinion of the Ninth Circuit remains the law. Even if a plaintiff has no genuine expectation of recovering a bonanza in punitive relief, a well-pleaded prayer for exemplary damages is an effective form of "graymail" to exact a settlement in an otherwise dubious claim.

SUMMARY OF ARGUMENT

The Court of Appeals, in *Russell v. Massachusetts Mutual Life Insurance Company,* 722 F.2d 482 (9th Cir. 1983) held that individual fiduciaries are personally liable to plan participants for punitive and extra-contractual compensatory damages under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., in a case arising out of the untimely disposition of a benefit claim. The Court of Appeals found this timeless requirement in the provisions of Section 503 of ERISA, 29 U.S.C. Section 1133, and, in particular, in the regulation promulgated thereunder by the Secretary of Labor at 29 CFR Section 2560.503-1(h). This regulation, as the Court of Appeals notes, requires that benefit decisions be made "promptly," but in any event no later than 120

days from the "receipt of a request for review." *Id.* at 489. Failure to meet this time deadline, so the Court held, is a breach of fiduciary duty and exposes individual fiduciaries to the spectre of potentially enormous personal liability. The Court reached this conclusion notwithstanding the fact that the very same regulations issued by the Secretary of Labor provide that if a benefit decision is not rendered within the time required, "the claim shall be deemed denied." 29 CFR § 2560.503-1(h)(4). This is the only remedy the Secretary of Labor contemplated for untimely action upon a benefit claim, and was undoubtedly drafted so as to permit participants to avoid a contention that they failed to exhaust their administrative remedies in the event they bring suit after the passage of 120 days. *Amato v. Bernard,* 618 F.2d 559 (9th Cir. 1980); *Scheider v. United States Steel Corp.,* 486 F.Supp. 211 (W.D. Pa 1980).

Amici Curiae contend that in reaching its decision, the Court of Appeals failed to take into account the requirements of Section 302(c)(5) of the Labor-Management Relations Act and the express Congressional policy favoring multiemployers trusts. *NLRB v. Amax Coal Co.,* 453 U.S. at 338 n. 22. Moreover, by implying new remedies into a comprehensive statutory scheme, the Court of Appeals ignored the disparate impact its ruling would have among the several states, despite the clear Congressional purpose of achieving uniformity in the regulation of Taft-Hartley Trust Funds and contrary to prior rulings of this Court in analogous circumstances.

ARGUMENT

I.

The Court of Appeals' holding is inconsistent with the Federal Regulatory Scheme governing Multiemployer, Taft-Hartley Trust Funds.

There is no mention of Section 302(c)(5) of the Labor-Management Relations Act in the opinion of the Court of Appeals. Similarly, there is no mention of multi-employer trust funds. Yet, it seems clear that the ruling of the Court of Appeals applies to all persons regulated by ERISA, including the fiduciary-trustees of multiemployer Taft-Hartley funds, such as these Amici Curiae.

The Court of Appeals' failure to consider the relationship of Section 302(c)(5) to ERISA led that Court to embrace certain plainly erroneous premises. Moreover, these fallacious premises served as the underpinnings for its ultimate conclusion which, it is urged, betrays those faulty premises. For example, the Court of Appeals noted that "ERISA was intended to serve as a substitute for various existing state protective laws and regulations . . . It would be anomalous if Congress eliminated the protections offered by state law without providing comparable federal protections." *Russell v. Massachusetts Mutual,* 722 F.2d at 488.

However, it is clear that multiemployer Taft-Hartley trust funds were regulated by federal law, to the exclusion of state law, long prior to the passage of ERISA. Moreover, this regulation by federal laws other than ERISA has not been supplanted by ERISA. On the contrary, it continues to date and must, therefore, be reconciled with ERISA.

In a pre-ERISA suit seeking benefits from a Taft-Hartley trust fund, the Ninth Circuit itself held that state laws pertaining to commercial insurance contracts are "not consistent with the federal policy of treating parties to collective bargaining contracts as parties of equal strength." *Rehmer v. Smith,* 555 F.2d 1362, 1369 (9th Cir. 1976).

Some thirteen years ago, this Court observed that under Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185, retirees have a cause of action in the context of a Taft-Hartley Trust Fund for breach of the obligation to pay pension benefits. *Chemical Workers Local 1 v. Pittsburg Plate Glass Co.,* 404 U.S. 157, at 176-77 n. 17. It has also been held that punitive damages are not available under Section 301. *Williams v. Pacific Marine Association,* 421 F.2d 1287 (9th Cir. 1970). Therefore, contrary to the pronouncement of the Court of Appeals, the protections afforded participants in Taft-Hartley trust funds prior to ERISA were offered by federal law, not state law. These protections did not encompass punitive relief. Accordingly, when Congress enacted ERISA, it did not supplant state law to the disadvantage of participants in Taft-Hartley Funds. As to these funds, ERISA did no more than augment existing federal regulation.

In addition, this Court and the Ninth Circuit have both stated that ERISA did not supplant Section 302(c)(5). *UMW Health & Retirement Funds v. Robinson,* 455 U.S. 562, 575 (1982); *Hurn v. Retirement Fund Trust,* 803 F.2d 386, 391 (9th Cir. 1983). As the Court in *Hurn* put it, "ERISA was not to affect any federal laws not specifically mentioned." *Id.*

In view of this on-going federal regulation of multi-employer trust funds, and the solicitious attitude of Con-

gress towards these funds, it is peculiar that the Court of Appeals should adopt a rule at this late date which may ultimately lead to the demise of such funds. The imposition of punitive damages upon individual trustees of these funds is, it is submitted, plainly at odds with Section 301 and Section 302(c)(5) and the decisions of this Court thereunder. This conflict created by the decision of the Court of Appeals is exacerbated by the Court's discussion of the duties imposed by ERISA regarding the processing of benefit claims. The Court notes that these duties are in part identical to standards imposed upon labor organizations under *Vaca v. Sipes,* 386 U.S. 171 (1967) and its progeny. Yet this court has unequivocally held that punitive damages are unavailable in breach of fair representation cases. *Electrical Workers v. Foust,* 442 U.S. 60 (1979). It is difficult to imagine that Congress intended individual fiducaries to process claims with the same or similar standard of care obtaining in fair representation cases, and at the same time intended that disgruntled benefit claimants could secure punitive relief against individual Taft-Hartley trustees. Therefore, these Amici Curiae urge the Court to reconcile this conflict created by the Court of Appeals.

II

Exposing individual fiduciaries to punitive damages in benefit claims cases will jeopardize the entire field of trust funds, since such damages are uninsurable in many jurisdictions.

ERISA contains an express statutory provision governing suits by participants arising out of claims for benefits [ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(A)(1)(B)]. Despite this express statutory scheme,

the Court of Appeals held that a participant may elect to characterize a denial of benefits as a breach of fiduciary duty. As such, so the Court of Appeals held, the participant may sue under ERISA Section 502(a)(2), 29 U.S.C. Section 1132(a)(2) and obtain for his or her own account the "remedial relief" against fiduciaries referred to in ERISA Section 409, 29 U.S.C. Section 1109. The Court of Appeals further concluded that this "remedial relief" encompassed both compensatory damages (such as damages for mental and emotional distress) and punitive damages. The Court of Appeals reached this conclusion notwithstanding the possibility that a punitive award could impair the stability of Taft-Hartley funds, cf. *Electrical Workers v. Foust,* 442 U.S. at 705, and notwithstanding the express Congressional policy of favoring multiemployer trusts. *NLRB v. Amax Coal Co.,* 453 U.S. at 338 n. 22.

In finding that the "remedial relief" available to benefit claimants encompassed compensatory damages, the Court of Appeals noted that such damages were recoverable against the fiduciary personally, and not as against the benefit plan itself. *Russell v. Massachusetts Mutual,* 722 F.2d at 490, n. 8. Of course, in this case, the only fiduciary sued was Massachusetts Mutual Life Insurance Company, as distinguished from the individual members of the company's disability committee. Accordingly, the only "personal" liability which might attach in the instant case will be borne by an entity, as distinguished from any individual. Nevertheless, the Court of Appeals' rationale applies equally to individuals, such as the Trustees of these trust funds, where they occupy fiduciary positions and are named defendants. Apparently, in the

belief that it was softening the blow behind its holding, the Court of Appeals observed that "ERISA does allow for certain forms of fiduciary indemnification under Section 1110." *Id.*

Section 410 of ERISA, 29 U.S.C. Section 1110, however, does ***not*** in fact provide for "fiduciary indemnification" in the traditional sense of the phrase. On the contrary, ERISA made unlawful exculpatory clauses historically employed in trust indentures, designed to insulate trustees from personal liability. Thus, Section 410 expressly provides, in relevant part, that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [Part 4 of ERISA, entitled "Fiduciary Responsibility"] shall be void as against public policy." Section 410 does go on to provide that a plan may purchase insurance for itself or for its fiduciaries, *so long as* such insurance "permits recourse by the insurer against the fiduciary in case of a breach of a fiduciary obligation by such fiduciary." In addition, under Section 410, fiduciaries are permitted to buy their own insurance, or employers or unions are permitted to buy insurance for the fiduciary. In short, pursuant to Section 410, a fiduciary is permitted to obtain liability insurance, so long as someone other than the plan pays the premium. Insurance *may* be available to protect an individual trustee against claims by participants for compensatory damages. However, it will be noted that the Court of Appeals did not drop any such palliative footnote when it concluded that individual fiduciaries were also exposed to punitive damages in benefit claims cases. This is so because, at least in the State of California where the instant case arose, an insurance carrier is barred by

both statutory and decisional law from providing insurance against punitive damages.

Thus, California Civil Code § 1668 provides as follows:

> "§ 1668. *Contracts contrary to policy of law.*
>
> CERTAIN CONTRACTS UNLAWFUL. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or wilful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of law."

§ 533 of the California Insurance Code similarly provides as follows:

> § 533. *Wilful act of insured; negligence.*
>
> An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or the insured's agent or others."

The California courts have concluded that these two code sections prevent an individual from insuring against punitive damages. *City Products Corp. v. Globe Indemnity Co.*, 88 Cal.App.3d 31 (1979); *Ford Motor Co. v. Home Insurance Co.*, 116 Cal.App.3d 374 (1981); *Peterson v. Superior Court*, 31 Cal.App.3d 147 (1982). Moreover, even if a policy of insurance by its terms expressly includes coverage for punitive damages, an insurance carrier is still not liable to indemify an insured against a judgment for punitive damages. Thus, in the *City Products* case, for example, the policy in dispute covered "*all sums* the insured shall become legally obligated to pay as damages." [Emphasis supplied] *Id.* at 33. Notwithstanding the

breadth of coverage contained in the contract of insurance, the court in *City Products* reasoned as follows:

> "The policy considerations in a state where . . . punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, as compensatory damages already have made the plaintiff whole."

City Products, 88 Cal.App.3d 31, 39, *quoting Northwestern National Casualty Co.,* 307 F.2d 432 (5th Cir. 1962).

Accordingly, in California, punitive damages imposed under the standard enunciated by the Court of Appeals will rest ultimately as well as nominally on the individual Taft-Hartley trustees who have volunteered their time for the betterment of the industry. The *in terrorem* effect of being exposed to such personal financial jeopardy, in the face of ultimate responsibility for processing hundreds of thousands of claims, will deter all but the most doughty — or the most foolhardy — from serving a trusteeship.

III

A court should not imply a Congressional intent to permit the recovery of punitive damages, where such relief will impact disparately among the several states.

While California will leave Taft-Hartley trustees personally exposed to punitive damages, in other jurisdictions individuals fiduciaries will not function under such a spectre. Thus, at least 14 states have concluded that an individual may insure against punitive damages:

(1) Arizona, *Price v. Hartford Accident & Indemnity Co.,* 108 Ariz. 485, 502 P.2d 522 (1972); (2) Arkansas, *California Union Ins. Co. v. Arkansas Louisiana Gas Co.,* 264 Ark. 449, 572 S.W.2d 393 (1978); (3) Georgia, *Greenwood Cemetery, Inc. v. Travelers Indem. Co.,* 238 Ga. 313, 232 S.E.2d 910 (1977); (4) Idaho, *Abbie Uriquen Oldsmobile Buick, Inc. v. United States Fire Ins. Co.,* 95 Idaho 501, 511 P.2d 783 (1973); (5) Iowa, *Cedar Rapids v. Northwestern Nat. Ins. Co.,* 304 N.W.2d 228 (1981); (6) Kentucky, *Continental Ins. Co. v. Hancock,* 507 S.W.2d 146 (1973); (7) Louisiana, *Fagot v. Ciravola,* 445 F.Supp. 342 (ED La 1978); (8) Maryland, *First National Bank v. Fidelity & Deposit Co.,* 283 Md. 228, 389 A.2d 359 (1978); (9) Mississippi, *Anthony v. Frith,* 394 S.2d 867 (1981); (10) Oregon, *Harrell v. Travelers Indemn. Co.,* 279 Or. 199, 567 P.2d 1013 (1977); (11) Tennessee, *Lazenby v. Universal Underwriters Ins. Co.,* 214 Tenn. 639, 383 S.W.2d 1 (1964); (12) Texas, *Ridgway v. Gulf Life Ins. Co.,* 578 F.2d 1026 (5th Cir. 1978); (13) Vermont, *State v. Glens Falls Ins. Co.,* 137 Vt. 313, 404 A.2d 101 (1979); (14) West Virginia, *Hensley v. Erie Ins. Co.,* 283 S.E.2d 227 (1981).

On the other hand, and in addition to California, at least 12 states have concluded that liability insurance coverage for an award of punitive damages is void as against public policy: (1) Colorado, *Universal Indem. Ins. Co. v. Tenery,* 96 Colo. 10, 39 P.2d 776 (1934); (2) Connecticut, *American Ins. Co. v. Saulnier,* 242 F.Supp. 257 (D.C. Conn. 1965); (3) Florida, *Dorsey v. Honda Motor Co.,* 655 F.2d 650 (5th Cir. 1981); (4) Illinois, *Beaver v. Country Mutual Ins. Co.,* 95 Ill.App.3d 1122, 420 N.E.2d 1058 (1981); (5) Indiana, *Grant v. North River Ins. Co.,* 453 F.Supp. 1361 (N.D. Ind. 1978); (6) Kansas, *American*

Surety Co. v. Gold, 375 F.2d 523 (10th Cir 1966); (7) Minnesota, *Wojciak v. Northern Package Corp.,* 310 N.W.2d 675 (1981); (8) Missouri, *Crull v. Gleb,* 382 S.W.2d 17 (1964); (9) New Jersey, *Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co.,* 172 N.J.Super 10, 410 A.2d 696 (1980); (10) New York, *Parker v. Agricultural Ins. Co.,* 109 Misc.2d 678, 440 N.Y.S.2d 964 (1981); (11) Pennsylvania, *Esmond v. Liscio,* 209 Pa. Super. 200, 224 A.2d 793 (1966); (12) Virginia, *Northwestern Natl. Casualty Co. v. McNulty,* 307 F.2d 432 (5th Cir. 1962).

Based on the foregoing, it is clear that the rule adopted by the Court of Appeals, were it to be embraced by other Circuits (which it has not), would fall unevenly upon individual fiduciaries, depending on the fortuity of which state law governed the terms of any contract of insurance. The Court of Appeals ruling will even have a disparate impact within the Ninth Circuit, for it will be noted from the foregoing that the states of Arizona, Idaho and Oregon each permit insurance against punitive damages, whereas California does not.

It may be urged that the argument herein cuts too far, for if adopted it would preclude Congress from ever enacting a statute calling for punitive relief because of the disparate impact such a statute may have among the several states. However, such a broad proposition is not advocated herein. Rather, because of the disparate impact among the several states, it should not lightly be presumed that Congress intended punitive relief be available, particularly where, as in the instant case, there is scanty evidence of any such Congressional intention.

IV

The Judiciary should not fashion new remedies in the face of a comprehensive legislative scheme.

ERISA describes a comprehensive and elaborate scheme for enforcement. See, e.g., ERISA Section 501, 502(a)(1)(A),(a)(4), and (c), and 502 (g)(1), 29 U.S.C. §§ 1131, 1132 (a)(1)(A), (a)(4) and (c), and 1132(g)(1). However, this elaborate scheme nowhere mentions punitive damages.

In an analogous context, this Court recently had occasion to pass upon the propriety of implying an additional remedy into a comprehensive legislative scheme. *Northwest Airlines v. Transport Workers Union,* 451 U.S. 77 (1981); see also, *Texas Industries v. Radcliffe,* 451 U.S. 630 (1981). In *Northwest Airlines,* the issue was whether the Equal Pay Act or Title VII of the 1964 Civil Rights Act would permit a defendant to seek indemnification or contribution from a third party. In holding that these statutes would not permit such a remedy, this Court opined as follows:

> "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. Both the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are such statutes. The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs."
> *Id.,* 451 U.S. at 97.

It is hard to imagine a more comprehensive legislative scheme than ERISA. When the requirements of § 302(c)(5) are added to those of ERISA, it becomes even clearer that judicially crafted remedies are unwarranted.

CONCLUSION

Based on the foregoing, together with such arguments as may be advanced by the Petitioners herein, the Amici Curiae respectfully urge this Court to reverse the Court of Appeals and conclude that neither punitive damages nor extra-contractual compensatory damages are available in the circumstances of this case.

Respectfully submitted,

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November 15, 1984

(17)

No. 84-9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and CECILIA STEVENSON,
Petitioners,
v.
DORIS RUSSELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO:CLC

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INTEREST OF AMICUS CURIAE

The amicus curiae United Steelworkers of America, AFL-CIO:CLC ("Steelworkers") respectfully submits this brief in support of Respondent Doris Russell, pursuant to Rule 36 of the Supreme Court Rules. Counsel for both Petitioner and Respondent have consented to the submission of this brief.

Amicus curiae has significant interest in the precedent which the Supreme Court will set in this proceeding. A complete reversal of the Ninth Circuit opinion below, and a blanket prohibition of punitive damages and extra-

contractual compensatory relief in ERISA cases, will have deleterious effect upon Steelworker members and retirees.

The Steelworkers, a labor organization, has approximately 900,000 active members and 300,000 retirees. Almost all of these persons are participants in pension plans and health insurance plans established and governed by ERISA. Practically all of these plans are "employer-controlled." In other words, unlike the many joint labor-management trusts which support Petitioner Massachusetts Mutual's position as amici curiae in this case, few if any Steelworker plans are "Taft-Hartley" plans. Accordingly, in the typical plan covering a Steelworker, the employer itself or its designee is the plan trustee and sole administrator. The Union has no involvement with the investment of plan assets or administration of the plan.

Presently, particularly in plant closing and strike situations, many of these employer-fiduciaries are improperly terminating or reducing plan benefits, and they are doing so for their own personal gain. Such class-wide terminations or reductions injure hundreds or even thousands of plan participants at each plant. Invariably, the employer-fiduciary's conduct runs counter to the parties' intent and defeats clear expectations of the participants. Judging from the weakness of the employers' defenses in these cases, it is clear that these employer-fiduciaries believe they have nothing to lose, and possibly much to gain, through violating participant rights. Whatever the employer "saves" by avoiding its obligations goes directly into its own coffers. Within the past three years alone, Steelworker members and retirees have been forced to institute at least 30 ERISA lawsuits to remedy these wholesale benefit terminations or reductions.

Only the sanction of punitive damages can deter these malicious, wilful and wanton breaches of fiduciary duty. Likewise, without the availability of extra-contractual

compensatory relief where an employer's conduct causes clearly foreseeable suffering, employers will continue to inflict such suffering on participants.

SUMMARY OF ARGUMENT

Below, the Ninth Circuit held that ERISA permits punitive damage awards against fiduciaries for breach of their fiduciary duties "in only very limited circumstances." Such awards may be made only if the fiduciary acted with *"actual malice* or *wanton indifference* to the rights of a participant or beneficiary." *Russell v. Massachusetts Mutual*, 722 F.2d 492 (9th Cir. 1984). (emphasis added). Since discovery herein is not yet complete and plaintiff Russell has not even had the opportunity to amend her complaint, the Court "intimate[d] no view as to [her] right to recover punitive damages" in this particular case. 722 F.2d at 492.

The Ninth Circuit's narrow holding as to punitive damages and "extra-contractual compensatory" remedies comports with Congressional intent, as evidenced in the legislative history and in the statutory language. In enacting ERISA, Congress unequivocably expressed its desire both to compensate victims of fiduciary breach and to *deter* such breaches by providing the full range of legal and equitable remedies. Moreover, Congress patterned the statute after traditional trust law principles under which courts allow trust beneficiaries to recover punitive damages to remedy serious breaches of fiduciary duty. Petitioners' novel position that the remedies set forth in Section 409 (29 U.S.C. Section 1109) are available only *to the plan* is contrary to the statute's plain language. Section 502(a)(2) (29 U.S.C. § 1132(a)(2)), allows a *participant* to bring suit for "appropriate relief" under Section 409. In turn, Section 409 provides that a fiduciary breaching its duties "shall be subject to such other equitable or remedial relief as the court may deem ap-

propriate." Petitioners cite no case law or legislative history to support their novel position.

The Supreme Court should not be swayed by the peculiar and, as yet, undeveloped fact situation now before it. Petitioners and their amici supporters characterize the alleged breach of fiduciary duty (i.e., untimely processing of Russell's claim) as a technical, procedural violation of plaintiff Russell's rights. If that prove the case, on remand Russell cannot show the "maliciousness" or the "wanton indifference" necessary to recover punitive damages. But this does not justify a total ban on punitive damages for all ERISA cases. We bring to the Court's attention those situations where self-interested employers have terminated benefits on a class-wide basis, causing injury and grave disappointment to large numbers of vulnerable, retired persons. We also note actual cases in which self-dealing employers have used plan assets improperly, thereby adversely affecting retirement income security of participants. In deciding this case, the Court must not lose sight of such cases—cases which affect many more people than does an individual claims-processing case such as Ms. Russell's.

Nor should the picture painted by the joint labor-management trust fund amici sway the Court. It is true that the fiduciaries of such trust funds reap no personal gain when they decide adversely to individual participants. Since an equal number of labor and management representatives sit on their trustee boards, theirs is truly a neutral decision-making procedure with built-in checks and balances. However, most plans lack these safeguards. In fact, 75 to 85 percent of this nation's plan participants are in employer-controlled plans where the employer-fiduciary stands to gain when its decisions harm participants.

In sum, to deter the most flagrant breaches of fiduciary duty—those committed with actual malice or wanton indifference to participants' right—ERISA requires punitive and extra-contractual compensatory damages in its remedial arsenal.

ARGUMENT

A. ERISA's Statutory Language and Legislative History Mandate that Exemplary Damages and Extra-Contractual Compensatory Relief Be Available to Victims of Serious Fiduciary Breaches

Petitioner Massachusetts Mutual and its supporting amici urge a tortured statutory construction in contending that participants have no right to relief under Section 409(a) of ERISA (29 U.S.C. § 1109(a)). Petitioners argue that only *the plan* can make recovery under Section 409(a).[1] Petitioners make this argument despite the clear wording of the statute. Section 502(a)(2) (29 U.S.C. § 1132(a)(2)) states that "(a) A civil action may be brought— . . . (2) . . . *by a participant* [or] *beneficiary . . . for appropriate relief under § 409.*" In turn, Section 409(a) provides:

> "**§ 1109. Liability for breach of fiduciary duty**
>
> (a) *Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter* shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and *shall be subject to such other equitable or remedial relief as the court may deem appropriate,* including a removal of such fiduciary. A fiduciary

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[1] See Petitioners' Brief, pp. 12-13. See also Brief of Alaska Fishermen's etc. Trust, pp. 11-12; Brief of American Council of Life Ins., etc., pp. 9-10. Significantly, Petitioners did not make this argument in either of the Courts below.

may also be removed for a violation of section 1111 of this title." (emphasis added).

Petitioners ignore that Section 409 confers an action on *participants* and authorizes "such other equitable or remedial relief as the court may deem appropriate." Instead, Petitioners focus upon the earlier clauses of Section 409(a) which state that losses or profits resulting from fiduciary breach must be restored "to the plan." Petitioners' argument is unpersuasive; had Congress intended to limit all Section 409(a) recoveries "to the plan," it most certainly would have inserted the limiting language after the broad phrase, "equitable or remedial relief as the court may deem appropriate." The failure to include the limitation signifies an intent to afford participants a direct right of recovery, and to provide flexible and meaningful remedies.

Moreover, when read in context with other provisions of the statute and the legislative history,[2] it is clear that participants may recover under Section 409, and that among the forms of the broad relief available are exemplary damages and extra-contractual compensatory relief. This is in accord with ERISA's mandate that its remedial provisions are to be liberally construed. *Eaton v. D'Amato*, 3 Employee Benefit Cases 1003, 1005 (D.D.C. 1980); *Gilliam v. Edwards*, 492 F. Supp. 1255, 1261, 1265 (D.N.J. 1980); *Matter of M&M Transp. Co.*, 3 B.R. 722 (S.D.N.Y. 1980); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979).[3]

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[2] The Ninth Circuit opinion and Respondent Russell's brief contain a comprehensive analysis of these provisions and of the legislative history. Amicus Steelworkers will not repeat this statutory analysis.

[3] See also, *Laborers' Fringe, etc. v. Northwest Concrete, etc.*, 640 F.2d 1350, 1352 (6th Cir. 1981) (ERISA's "enforcement provisions should have teeth: the provisions should be liberally construed 'to provide . . . participants . . . with broad remedies for redressing and preventing violations of the Act' "); see also *Freund v. Marshall, supra*, 485 F. Supp. at 643 (the "guiding principle" in determining recovery under Section 409(a) "should be to enforce the remedy which best carries out the purposes of the Plan and *is most advantageous to the participants and beneficiaries of the Plan*;" (emphasis added)).

In light of the manifest legislative intent, it is not surprising that many courts have allowed participants to directly recover exemplary damages or awards for mental anguish under Section 409(a)—without even considering whether only *the plan* can recover under that provision. *Russell, supra*; *Bobo v. 1950 Pension Plan*, 548 F. Supp. 623, 626 (W.D.N.Y. 1982); *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677 (C.D. Cal. 1982); *Free v. Gilbert Hodgman, Inc.*, 3 Employee Benefit Cases 1010 (N.D. Ill. 1982); *Eaton v. D'Amato, supra*, 3 Employee Benefit Cases 1003; *cf.*, *Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084, 1094-95 (W.D. Pa. 1983) (holding punitive damages available in ERISA cases, but not mentioning Section 409(a); fact situation suggests a clear violation of Section 409(a)). Other cases denied such relief under ERISA. E.g., *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 751 (N.D. Ga. 1983). But in so holding, these cases have never implied a limitation upon Section 409(a)'s relief "to the plan." In their brief, Petitioners cite no authority for this novel proposition.[4] See Petitioners' Brief, pp. 12-13.

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[4] Moreover, many of the decisions upon which Petitioners rely which have denied punitive damages do not address Section 409(a). Instead, they hold punitive damages unavailable under Section 502(a)(1)(B) or other provisions. E.g., *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984); *Diano v. Central States, etc.*, 551 F. Supp. 861 (N.D. Ohio 1982); *Calhoun v. Falstaff Brewing*, 478 F. Supp. 357 (E.D. Mo. 1979).

In any event, limiting a Section 409(a) recovery to "plans" would often preclude any remedy at all. This is so because most employer-controlled welfare benefits (and even some pension benefits) are *unfunded.* See discussion *infra* at pp. 13 to 14. Therefore, when an employer's fiduciary breach results in unlawful profits which exceed participants' out-of-pocket loss (e.g., in an insurance termination situation—see *infra* at p. 18), there is no plan fund into which the Section 409(a) recovery of unlawful profits can be paid.

Petitioners also emphasize, correctly, that Congress modelled ERISA's fiduciary requirements after "principles developed in the evolution of the *law of trusts.*" Petitioners' Brief, p. 18 (citing legislative history and *Donovan v. Bierwith*, 680 F.2d 263, 271 (2d Cir.), *cert. denied*, 459 U.S. 1064 (1982); see also *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984)).[5] However, Petitioners then assert that, because trust law is *equitable* but punitive damages are a *legal* remedy, Congress could not have intended to authorize punitive awards under ERISA.

Petitioners' argument fails for several reasons. First, it rests on an unduly formalistic and archaic distinction between courts of law and courts of equity. The "modern" view is that punitive damages are recoverable in equitable, as well as in legal, proceedings. *Charles v. Epperson & Co.*, 258 Iowa 409, 137 N.W. 2d 605, 618 (1965); *Hedworth v. Chapman*, 192 N.E. 2d 649, 650-51 (Ind. App. 1963); 22 *Am. Jur.* 2d, Damages § 239, p. 327 and footnote 10 (collecting authorities).

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[5] In fact, as courts have recognized, "in enacting ERISA Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds." *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983); *Sinai Hosp. of Baltimore v. National Benefit Fund, etc.*, 697 F.2d 562, 565-66 (4th Cir. 1982).

Second, Petitioners' law-equity distinction is particularly outmoded in the context of ERISA, a comprehensive employee benefit statute which authorizes "remedial" relief, "equitable" relief, as well as "sanctions." ERISA's legislative history shows that, in using these terms, Congress expressed its desire to afford even broader remedies than those available under equitable trust law. H.R. Report No. 533, 93d Cong., 2d Sess., *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate (1976) (hereinafter "Legislative History"), pp. 2358-60 ("reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries" and mandating ready "access to the courts"); S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* Legislative History, p. 615 (same). Accordingly, courts recognize that "application of traditional trust law principles may, in some instances, conflict with Congress' desire to *eliminate barriers to the protection and enforcement of rights in ERISA-covered benefits plans.*" *Thornton v. Evans*, 692 F.2d 1064, 1079 (7th Cir. 1982) (emphasis added); see also *Free v. Briody*, 732 F.2d 1331, 1337-38 (7th Cir. 1984).

Finally, Petitioners' argument simply ignores those many decisions grounded on general fiduciary and trust law concepts which allow punitive damages. Those decisions permit exemplary relief where the fiduciary engages in self-dealing or other wilful or malicious misconduct. *Palmer v. Fuqua*, 641 F.2d 1146, 1160-61 (5th Cir. 1981) (imposing a constructive trust and awarding exemplary damages for breach of fiduciary duty, stating: "[E]xemplary damages will not be awarded for a mere breach of contract. The instant suit, however, is not an action for a mere breach of contract; this is an action for . . . breach of fiduciary duty . . ."); *Financial General Bank-*

share, Inc. v. Metzger, 523 F. Supp. 744, 773-74 (D.D.C. 1981) (defendant's conduct "exhibits a sufficiently wanton and reckless disregard for his fiduciary obligations to support an award of punitive damages"); *Capitol Fed. Sav. & Loan Ass'n v. Hohman*, 682 P.2d 1309, 1310-11 (Kan. 1984) (to remedy fiduciary breach, "a court may award punitive or exemplary damages as incidental to equitable relief [collecting authorities]"); *Manges v. Guerra*, 673 S.W. 2d 180, 184 (Tex. 1984) ("Recovery against a breaching fiduciary is not limited to an accounting of profits received by the fiduciary, but can also include exemplary damages."); *Texas Bank & Trust Co. v. Moore*, 595 S.W. 2d 502, 510 (Tex. 1980) (same); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W. 2d 567, 584 (Tex. 1963) (same); *Wisconsin Avenue Associates v. 2720 Wisc. Ave. Coop. Assoc.*, 441 A.2d 956, 961-62 (D.C. App. 1982) (affirming punitive damages for breach of fiduciary duty count, as distinct from fraud count). That Congress patterned ERISA's fiduciary requirements after these trust law principles only buttresses the Ninth Circuit's holding for exemplary damages under ERISA.

B. Exemplary Damages and Extra-Contractual Compensatory Relief are Necessary to Deter Serious Breaches of Fiduciary Duty, Particularly where an Employer-Fiduciary is in a Conflict-of-Interest Situation

Twenty-three of the twenty-five amici supporting Petitioner Massachusetts Mutual are multiemployer, joint labor-management trust funds established pursuant to Section 302(c) of the Taft-Hartley Act (29 U.S.C. § 186 (c)).[6] Those funds are financed by contributing employers who pay specified amounts into separate segregated trust funds: independent trustee Boards distribute benefits. Equal numbers of labor and management representatives sit on these trustee boards which process benefit claims and interpret plan documents. Generally, members of these neutral boards may not gain personally by making a decision adverse to participants. The money "saved" by denying claims or restrictively interpreting class-wide eligibility requirements simply remains in the trust, and will still be used exclusively for the benefit of all participants. The assets of the fund can never revert to the trustees or to the employers. 29 U.S.C. § 186(c); Levin, N.A., *ERISA and Labor-Management Benefit Funds* (2d Ed., 1975), pp. 4-5.

[6] See Brief of Pipe Trust, etc., p. 3; Brief of Motion Picture Health & Welfare Fund, p. 2; Brief of Northern California Carpenters, etc., p. 3; and Brief of Alaska Fishermen's Union-Salmon Canners Pension Trust, etc., p. 2.

It is largely because of these built-in safeguards in Taft-Hartley trust situations that Courts ordinarily employ a deferential standard in judging the trustees' actions. Courts uphold the trustees' interpretation of plan documents unless it is "arbitrary and capricious." *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1976). If the trustees' interpretation is one of several reasonable alternatives, courts do not intervene. *Miles v. New York Teamsters Pension Fund*, 698 F.2d 593, 599-601 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 105 (1983); *Mestas v. Huge*, 585 F.2d 450, 453 (10th Cir. 1978).

The trust fund amici herein support Petitioner Massachusetts Mutual because they fear that the availability of exemplary damages and extra-contractual compensatory relief will have "drastic" consequences for the administration of their trusts. They contend that the mere possibility of obtaining such relief will discourage their trustees from serving, will inhibit trustees' decisions, and will encourage protracted litigation. (See e.g., Brief of Pipe Trust, etc., pp. 6, 10). We believe these fears are

unfounded. Because of the built-in safeguards which protect participants in Taft-Hartley plans, a disgruntled claimant could rarely, if ever, prove the higher standard of culpability for punitive damages which the Ninth Circuit in *Russell* prescribes. That a plaintiff would meet the standard becomes even more unlikely when the trustees are accorded their due deference under the "arbitrary and capricious" test.[7]

More than the unlikelihood of the trust fund amici's dire predictions, the Court must bear in mind that these amici's perspective is a narrow one, not typical of most ERISA plans. Trust fund amici would have the Court believe that all or most of the nation's plan participants enjoy the safeguards of neutral joint labor-management trustee boards. In fact, such multiemployer trusts cover only approximately 17% of the nation's pension plan participants,[8] and 25% of welfare benefit plan participants.[9] Conversely, the vast majority participate in *employer-controlled* plans. In those plans, the fiduciary-administrators are exclusively management representatives or outside insurance companies acting at the behest of management. There are no employee or union representatives to keep the management-fiduciaries in check.[10] In most cases, the principal fiduciary is the employer itself.

In contrast to the Taft-Hartley context the employer-controlled fiduciary stands to profit when it denies a claim or terminates benefits. The savings flow directly to the employer's treasury. This is true, first, because there is frequently no segregated fund from which the employer pays benefits. Employer-controlled welfare benefit plans (e.g., for health, vision, disability and life insurance) need not be funded. (See 29 U.S.C. § 1081 (a)(1); see also *BNA Daily Labor Report*, No. 152 (8-7-84), pp. C-1 to C-3, observing that very few employer-controlled retiree insurance plans are in fact

---

[7] In most cases, a district court can strike a demand for punitive damages very early in the case, after very minimal discovery. Thus, contrary to the fears of trust fund amici (see Brief for Northern California Carpenters' Trust, etc., pp. 5-6) lengthy discovery into defendant's assets, for punitive damage purposes, would be precluded.

To further discourage unfounded punitive damage claims, this Court could even go so far as to announce a *per se* rule. The rule would simply make punitive damages (and even extra-contractual compensatory relief) *unavailable* where a participant sues joint labor-management trustees for untimely or improper processing of participants' claim, where there is no opportunity for self-dealing. *Cf.*, 22 *Am. Jur.* 2d, Damages § 253, pp. 346-47. The Court's imposing *per se* rules as "judicial gloss on . . . statutory language" has precedent in antitrust law. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

[8] 8,707,000 of the nation's 52,271,000 pension plan participants are in multiemployer plans. "Estimates of Participants and Financial Characteristics of Private Pension Plans," U.S. Department of Labor, Labor-Management Services Administration, Office of Pension and Welfare Programs (1983), p. 12, Table 6. Virtually all multiemployer plans are Taft-Hartley plans. Virtually all single-employer plans are *non*-Taft-Hartley plans.

[9] Cooper, R.D., *Multiemployer Health and Welfare Plan Operations and Expenses (Multiemployer Health and Welfare Plan)*, p. 14 (1983). International Foundation of Employee Benefit Plans, Brookfield, Wisconsin.

[10] In fact, 60% of pension plan participants and 68% of health plan participants are without any union representation. Beller, Daniel, "Coverage Patterns of Full-Time Employees Under Private Pension Plans," *Social Security Bulletin* (July, 1981), p. 7, Table 4 (showing 12,036,000 of a total 29,867,000 pension plan participants in union negotiated plans); Hoffman, Arnold, "Group Health Insurance Coverage of Private Full-Time Wage and Salaried Workers" (Unpublished Study of U.S. Department of Labor, Office of Pension and Welfare Benefit Plans (1979)) (showing 14,042,000 of 43,607,000 health plan participants in union negotiated plans).

Unlike Steelworker participants, participants in the non-union plans do not even have the benefit of collective bargaining representatives who can question the employer-fiduciary's actions and give support to the participants in pursuing their claims.

prefunded). Consequently, many employers act as self-insurers for these types of benefits, and do not set aside any funds for future benefits. Benefits denied equal monies saved.[11] Even some pension benefits of employer-controlled plans need not be funded. For example, the employer need not fund certain early retirement "shut-down" pensions, eligibility for which depends upon factors other than the actuarially determined life expectancies of participants. Among such factors are plant shutdown. See *Sutton v. Weirton Steel*, 724 F.2d 406, 411-12 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984). ("No provision of the Act requires this contingent liability to be funded as an asset of the plan . . . [T]he only source of payment would be the company's treasury.") Second, even where an employer maintains a fund to support the typical defined-benefit single-employer plan, that employer still reaps a profit when it interprets eligibility requirements restrictively and denies claims. ERISA only requires minimal funding based upon the actuarially determined life expectancies of participants. 29 U.S.C. § 1082. The fewer claims the employer pays, the smaller the contributions the employer will have to make in the future.

Employer-controlled plans not only tempt employers to deny benefits for direct monetary gain; there are opportunities for other types of self-dealing. For example, the employer can use pension fund assets for personal investments.[12] It can threaten to terminate—or actually terminate—benefits to gain collective bargaining leverage.[13] It can fraudulently misrepresent to participants

[11] Apparently, in neither of Massachusetts Mutual's disability plans were benefits administered through a separate segregated fund. In one, benefits were paid "from the assets of the company," and, in the other, through an insurance policy. *Russell*, 722 F.2d at 486.

[12] See footnote 18, *infra*, and accompanying text.

[13] See footnote 17, *infra*, and accompanying text.

their respective shares payable in a profit-sharing plan.[14]

Because opportunities for self-dealing and inherent conflicts of interest abound, courts don't apply the deferential "arbitrary and capricious" standard to employer-fiduciaries of employer-controlled plans. Rather, courts enforce the stringent duty of loyalty to participants which ERISA exacts. For example, the Second Circuit in *Donovan v. Bierwirth, supra*, 680 F.2d at 271, stressed the fiduciaries' duty to avoid positions "where their acts as officers or directors of the corporation will prevent . . . complete loyalty to participants . . ."; see also *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 639-44 (W.D. Wis. 1979); *Corley v. Hecht Co.*, 530 F. Supp. 1155 (D.D.C. 1982). If the fiduciaries' own interests conflict with those of the participants, the fiduciary should step aside, appointing a neutral administrator to make the decision. *Bierwirth, supra*, 680 F.2d at 271-72. When the fiduciary retains authority, his actions are subjected to close scrutiny. *Leigh v. Engle, supra*, 727 F.2d at 125; *Bierwirth, supra*, 680 F.2d 271-76; *Viggiano v. Shenango China*, 574 F. Supp. 861, 866-67 (W.D. Pa. 1983); *cf., NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-37 (rule against a fiduciary "dividing his loyalties must be enforced with 'uncompromising rigidity.'" *Id.* at 329-30). III *Scott on Trusts* § 187, p. 1524 (in determining whether trustee has abused his broad discretionary powers afforded by trust instrument, courts look to whether trustee's interests conflict with those of beneficiary).

Struble v. N.J. Brewery Emp. Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984), applied this principle to a joint labor-management trust fund and its trustee fiduciaries. The *Struble* Court held the "arbitrary and capricious" standard applicable only where "individual claimants challeng[e] the [labor-management] trustees'

[14] See *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir. 1984) (finding punitive damages appropriate in such situation).

denial of benefits [and when] the issue . . . is whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants." By contrast, the *strict standard* applies when the "gravamen of the complaint" is that fiduciaries "have sacrificed valid interests *to advance the interests of non-beneficiaries.*" *Id.* at 333-34 (emphasis added).[15]

For the foregoing reasons, we disagree with the position of Petitioners and certain amici that Massachusetts Mutual's conduct, as fiduciary, is judged by the "arbitrary and capricious" standard. Had Massachusetts Mutual denied Ms. Russell's claim, the money saved would have gone directly to the Company—placing it in a conflict-of-interest situation. While plaintiff did not address this issue below, the Ninth Circuit apparently considered the arbitrary and capricious standard applicable. (See *Russell;* 722 F.2d at 489 and footnote 7). The Ninth Circuit went on to conclude, however, that "ERISA may require a stricter standard" than a union's duty of fair representation. (Citing *Vaca v. Sipes,* 386 U.S. 171, 192 (1967); *Robesky v. Qantas Empire Airways,* 573 F.2d 1082, 1089-90 (9th Cir. 1978). We believe that where the ERISA fiduciary is in a conflict-of-interest situation,

[15] Federal courts applying the arbitrary and capricious standard to Taft-Hartley fiduciaries have also relied on trust instruments, quite typical among Taft-Hartley trusts, which grant trustees broad discretion to interpret eligibility requirements and process claims. *Kosty v. Lewis,* 319 F.2d 744, 747 (1963), *cert. denied,* 375 U.S. 964 (1964); *Roark v. Lewis,* 401 F.2d 425, 426-27 (D.C. Cir. 1968); see also III *Scott on Trusts,* § 187, p. 1501 (where terms of trust grant trustee discretion, court will not interfere if trustee's action is "within the bounds of reasonable judgment"). This Court has recently indicated that the arbitrary and capricious standard does not apply where parties to collective bargaining do not grant trustees wide latitude to interpret the provision in question. *United Mine Workers v. Robinson,* 455 U.S. 562, 573-74 (1982). Thus, the deferential standard would not apply to those employer-controlled collectively bargained plans in which unions (such as amicus herein) do not grant such discretionary powers.

ERISA requires a *much* stricter standard than does the fair representation duty. However, where there is no conflict of interest, ERISA and Section 302(c) of Taft-Hartley impose a standard no more stringent than the deferential one applicable to a union's duty of fair representation. Accordingly, it may very well be appropriate for the Court to hold that punitive damages are, *per se,* not recoverable against Taft-Hartley funds in typical claims-processing situations. *Cf., International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979) (punitive damages not recoverable in duty of fair representation lawsuits). See also, footnote 7, *supra.* But punitive damages may be awarded where trustees' interests conflict with those of the participants.

This Court should also be aware that there are more serious types of fiduciary breach than that which plaintiff Russell alleges. Plaintiff Russell alleges that the fiduciaries took 132 days to process her claim, rather than the 120 days which ERISA regulations require. One would hardly search here for the "malice or wanton indifference" which is the prerequisite for punitive damages. It is for this reason that Petitioners and their supporting amici fix upon these facts when they argue that only very limited relief is available in ERISA cases. In their brief, Petitioners stress repeatedly that "the Court need look no further than this case for an illustration" of why punitive and pain and suffering damages should be unavailable. Petitioners' Brief, pp. 38, 27. Thus, Steelworkers urge the Court to employ a broader field of vision. We urge the Court to consider the following four examples of serious fiduciary breach:

EXAMPLE No. 1.

Jones, a plan participant in an employer-controlled plan, is rushed to the hospital with a heart ailment. Doctors determine that only a heart transplant can save him. A good donor with a very compatible blood type is available. Since heart transplants cost many

thousands of dollars, the hospital checks with the employer-administrator to determine whether Jones' insurance plan covers the operation. While the plan clearly covers transplants, the employer personally disfavors them. In addition, he intensely dislikes employee Jones. The employer delays in notifying the hospital that the plan covers transplants. As a result, Jones dies of cardiac arrest.

EXAMPLE No. 2.

An employer is sole administrator of a collectively bargained unfunded health insurance plan for retired employees. These retirees may number in the hundreds or even thousands. Over the years, employer-representatives administering the plan have told employees that their insurance benefit, like their pensions, lasts throughout their lifetimes. Moreover, the plan's language also indicates a benefit that lasts for life. Nevertheless, in closing its plant, the employer-fiduciary terminates insurance for all retired people. The retirees, elderly and living on fixed incomes, are forced to go without needed medical care. Their medical problems become aggravated, possibly causing some deaths. The employer thus forces the participants to bring suit. While the employer knows there is little chance of successfully defending the suit on the merits, it feels it has nothing to lose. If it wins by some fluke (or because plaintiffs cannot match highly paid corporate counsel) then it saves millions of dollars it would have otherwise had to spend on this unfunded benefit. It will save even in losing. First, absent punitive damages, no onerous non-contractual liability need concern it. Second, participants will cut back their use of medical services when the plan terminates. Therefore, participants' recovery of out-of-pocket expenses will rarely equal the amount the employer would have had to pay had it continued insurance premiums (or self-coverage, if its plan is self-insured.) In any event, the employer most likely has no intention of defending the lawsuit to its conclusion. Rather, it hopes to gain a settlement from the desperate participants

which will shave millions of dollars off its expected liability. It hopes to gain settlement through direct lump-sum offers to individual participants (e.g., *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1483 and footnote 9 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 1002 (1984)), or through a class-wide settlement.[16]

EXAMPLE No. 3.

A collectively-bargained health insurance plan obligates an employer to continue insurance for active

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[16] This example is anything but hypothetical. The following is only a partial list of cases (including cases brought by Steelworker, Auto Worker and non-union retirees) in which employers have recently discontinued this retirement insurance benefit. *Alford v. Strichman*, Civ. Action No. 84-20 (pending in W.D. Pa.) (involving termination of retiree benefits for over 4,500 pensioners and surviving spouses; discussed in Johnson, Haynes, "Steel Valley's Bitter Scrap," *Washington Post* (January 28, 1984, p. 1); defendant Colt Industries has recently made, over the objection of plaintiffs' counsel, unilateral lump sum settlement offers to participants); *Mamula v. Satralloy, Inc.*, 100 CCH Labor Cases ¶ 10,770 (S.D. Ohio 1983); *Hansen v. White Farm Equipment Co.*, 5 Employee Benefit Cases 2130 (N.D. Ohio 1984); *Eardman v. Bethelhem Steel Corp.*, 5 Employee Benefit Cases 1985 (W.D.N.Y. 1984); *UAW v. Yard-Man, Inc., supra; UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984); *Puz v. Bessemer Cement Co.*, Civ. Action No. 82-2378 (pending in W.D. Pa.); *Keffer v. Connors Steel Co.*, Civ. Action No. 84-3137 (pending in S.D.W. Va.); *Trebus v. Youngstown Steel Door*, Civil Action No. 84-3413Y (pending in N.D. Ohio); *United Steelworkers, et al. v. Dayton-Walther Corp.*, Civ. Action No. 3-84-640 (pending in S.D. Ohio); *UAW v. Federal Forge, Inc.*, 583 F. Supp. 1350 (W.D. Mich. 1984); *Local Union No. 150-A, etc. v. Dubuque Packing Co.*, Civil Action No. 83-1037 (April 26, 1984 Order, N.D. Iowa); *Steelworkers Local 2341 v. Whitehead & Kales Co.*, 94 CCH Labor Cases ¶ 13,600 (E.D. Mich. 1982); *Anderson v. Alpha Portland Cement*, 727 F.2d 177, 180 (8th Cir. 1984); *Bunch v. Pacific States Steel Corp.*, Civ. Action No. 80-4042 (N.D. Calif.); *Grimaldi v. Teledyne Mid-America Corp.*, Civ. Action No. B-83-7 (pending in D.Conn.); *Policy v. Powell Pressed Steel Co.*, Civ. Action No. C82-2402Y (pending in N.D. Ohio and Sixth Circuit Court of Appeals).

employees, even while they are on strike. The employer has continued the insurance during past strikes. Nevertheless, at the end of negotiations when the contract expires, the employer notifies the union that it is terminating coverage. While the plan itself allows a participant a 30-day grace period to purchase insurance retroactively even upon *proper* termination, the employer simply notifies hospitals and employees that coverage has ceased. As a result, employees entering hospital emergency rooms, including a woman in labor, are told that they will not be admitted unless they agree to pay the bills directly. Understandably, these incidents cause extreme emotional distress. The employer's obvious motivation for this unlawful and widely-publicized termination of coverage is to bring pressure upon the employees and their union in collective bargaining negotiations. The employees are forced to sue. Without punitive damages, the employer feels it has nothing to lose. Attorneys' fees are a cheap price for the leverage the employer gained in negotiations.[17]

EXAMPLE No. 4.

Top officers of Company A are also trustees and fiduciaries of Company A's employer-controlled pension plan. These officers seek control over the smaller, more lucrative Company B. But Company B does not wish to be acquired, and Company A's treasury and credit line are insufficient to mount an unfriendly takeover bid. Therefore, Company A's officers use its pension plan's substantial assets to finance their tender offer. While this use exposes the pension fund assets to considerable risk, the takeover succeeds and it reaps handsome profits for Company A and even for the pension fund. The plan participants bring suit. However, without the threat of punitive damages, neither Company A's

[17] See *Viggiano v. Shenango China, supra,* 574 F. Supp. at 867; *United Steelworkers v. Fort Pitt Steel Castings,* 452 F. Supp. 886, 890 (W.D. Pa. 1978), *affirmed,* 598 F.2d 1273 (3d Cir. 1979).

officers nor fiduciaries of other employer-controlled plans are deterred from engaging in like conduct in future years.[18]

In sum, most of the nation's ERISA plans are employer-controlled. As such, the employer's administration of the plan presents ample opportunity for unlawful self-dealing, malice toward participants, and consequential distress and hardship for participants. The foregoing examples illustrate this problem of an employer-fiduciary in a conflict-of-interest situation. While courts closely scrutinize such employer's conduct when there is opportunity for self-dealing, there is little to deter that employer and other employers[19] from engaging in such future conduct when punitive damages and extra-contractual compensatory relief are precluded. A much smaller number of plans are joint labor-management "Taft-Hartley" trusts, the administration of which presents far fewer opportunities for self-dealing. Trustees of Taft-Hartley plans have little to fear from the Ninth Circuit's opinion below. The trustees' conduct is generally judged by the "arbitrary and capricious" standard, and, in any event, plaintiffs must prove that such conduct was malicious or carried out with wanton indifference to plaintiffs' rights.

[18] See, e.g., *Leigh v. Engle, supra,* 727 F.2d 113; *Donovan v. Bierwith, supra,* 680 F.2d 263.

[19] Exemplary damages serve "as a warning and example to deter [defendant] *and others* from committing like offenses in the future." 22 *Am. Jur.* 2d, Damages § 237, p. 323 (emphasis added). Thus, far from opening the "floodgates" for litigation, as Petitioners allege, allowing such relief will discourage unlawful conduct and thus decrease the likelihood of litigation.

CONCLUSION

Based upon the foregoing, the amicus Steelworkers respectfully urges this Court to affirm the Ninth Circuit's decision below, which holds that participants may recover —in limited circumstances—exemplary damages and extra-contractual compensatory relief under Section 409 (a) of ERISA.

Respectfully submitted,

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No. 84-9

In The

Supreme Court of the United States

October Term, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY AND CECELIA STEVENSON

Petitioners,

vs.

DORIS RUSSELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of benefit claims?

PARTIES TO THE PROCEEDING

The parties to this action are Petitioners, Massachusetts Mutual Life Insurance Company, and Cecelia Stevenson, and Respondent, Doris Russell. The claims against Cecelia Stevenson are not at issue in this appeal to the Supreme Court.

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BRIEF FOR RESPONDENT

I. STATEMENT OF THE CASE

In her response to the petition for certiorari, respondent, Doris Russell, has already objected at length to Petitioners' characterization of the facts of this case (pages 6-12). A further detailed discussion of the facts is not particularly relevant to the issues before the United States Supreme Court, as the Ninth Circuit did not base its opinion upon any particular set of facts.

II. SUMMARY OF ARGUMENT

There are two issues presented to the Supreme Court for its review, 1) whether an ERISA fiduciary may be held personally liable to a participant for extra-contractual damages for a breach of fiduciary duty and, 2) whether an ERISA fiduciary may be held liable for punitive damages for malicious, wanton, or bad faith misconduct.

ERISA, the Employee Retirement Income Security Act, 29 U.S.C. Section 1000 *et seq.*, provides broad equitable and legal remedies against fiduciaries who breach their duties. ERISA is remedial legislation which should be construed liberally in favor of those persons it was meant to protect, namely, participants and beneficiaries under covered pension and welfare plans. Congress intended that a body of substantive law be developed by the courts to fill in the gaps left by ERISA's provisions and to fulfill its purpose of redressing and preventing violations of the Act. The courts should look to federal common law and state law which is compatible with the purposes of ERISA.

Participants and beneficiaries are empowered by 29 U.S.C. Section 1132 to sue for breach of fiduciary duty under 29 U.S.C. Section 1109. Even if they were not, it would be appropriate to read a private right of action for participants and beneficiaries into Section 1109 because ERISA was enacted for their benefit, it was the intent of Congress to allow them broad remedies and their state law remedies have been preempted by ERISA. It would not be reasonable for Congress to occupy the field with respect to the interests of participants and beneficiaries in pension and benefit plans without providing federal protection and remedies to replace those barred.

Fiduciaries of ERISA should be liable for their breaches of duty which injure participants or beneficiaries. They may be held to a higher standard of conduct than required under traditional trust law. Fiduciaries should not be allowed to use ERISA as a shield.

Participants and beneficiaries are provided with a wide range of legal and equitable remedies under Section 1109 and Section 1132. Further, analogy to common law and state law for fiduciary tort liability and other federal labor statutes supports the availability of compensatory and punitive damages.

Extra-contractual damages should be allowed under ERISA to remedy the wrong, provide whatever remedies are necessary to make the aggrieved individual whole, and compensate for mental and emotional distress.

Punitive damages should also be allowed in limited circumstances where the fiduciary acts with actual malice, bad faith, or wanton indifference to the rights of a participant or beneficiary. Any possible deleterious effects are greatly outweighed by the benefits to participants and beneficiaries and the furtherance of the policy of ERISA by deterring and redressing violations of the act.

To hold that a plan participant or beneficiary can never be made whole through compensatory damages nor ever collect punitive damages for malicious or wanton acts would incorrectly immunize plan fiduciaries from liability for breaches of duty that injure plan participants and beneficiaries. Such a result is inconsistent with the express policy of ERISA.

III. REASONS WHY THE OPINION OF THE NINTH CIRCUIT SHOULD BE AFFIRMED

A. Introduction

The question presented by Petitioners to the Supreme Court for review is two-fold. One question is whether fiduciaries under ERISA may be held personally liable for extra-contractual damages for breach of fiduciary duty, which may include improper or untimely processing of benefit claims; and the other question is whether ERISA fiduciaries may be held personally liable to plan participants or beneficiaries for punitive damages for wanton, arbitrary, malicious, or bad faith misconduct of the fiduciary. It is misleading to combine the two issues, as Petitioners have done, because the standards for granting punitive damages are much stricter than those for compensatory damages. Petitioners suggest that either a beneficiary would be entitled to both punitive and compensatory damages against a fiduciary or to neither. Respondent submits that the court should consider these two questions separately.

In its well-reasoned decision below, the Ninth Circuit held that compensatory and punitive damages may be awarded under ERISA for breach of fiduciary duty. The Ninth Circuit held that extra-contractual damages should be available to remedy the wrong and make an aggrieved claimant whole. Additionally, punitive damages should be available in very limited circumstances where there is evidence of malice, wanton indifference or other outrageous conduct on the part of a fiduciary.

The Ninth Circuit stressed the remedial nature of ERISA and the intent of Congress to provide a compre-

hensive scheme of fiduciary responsibilities and duties encompassing both the management of plan assets and the handling and processing of participant's claims and to afford remedies for violation of those responsibilities, obligations, and duties. The court held that processing a claim in a perfunctory or arbitrary manner or in bad faith or without the exercise of reasonable care or failure to render a decision promptly within the required time limit would constitute a breach of fiduciary duty. The court pointed out that ERISA was intended to serve as a substitute for state protective laws and regulations and that it would be anomalous if Congress eliminated the protections offered by state law without providing comparable federal protections.

B. The Court Of Appeals Was Correct In Finding That ERISA Allows Claims For Compensatory Damages And Punitive Damages Against Fiduciaries For Breach Of Fiduciary Duty

1. Beneficiaries are entitled to broad equitable, and remedial relief under ERISA

Congress enacted ERISA in response to the dramatic growth of employee benefit plans in recent years and the importance they have assumed in the security of millions of workers. It was found desirable to assure disclosure and to create safeguards with respect to the establishment, operation, and administration of such plans. Congress noted in particular that existing law offered no assurance that these plans were financially sound or that they were administered in a way which actually gave workers the promised benefits. Congress sought to correct the pattern of wasting and looting which had resulted in denial

of benefits to the intended recipients of the plans. *Cate v. Blue Cross and Blue Shield of Alabama*, 434 F.Supp. 1187, 1188 (E.D. Tenn. 1977). *Wadsworth v. Whaland*, 562 F.2d 70, 73 (1st Cir. 1977). *Lederman v. Pacific Mutual Life Insurance Company*, 494 F.Supp. 1020, 1022 (C.D. Cal. 1980).

Congress expressed its legislative intent in 29 U.S.C. Section 1001(b) as follows:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

The responsibilities and liabilities of fiduciaries are set forth in 29 U.S.C. Sections 1104 and 1109 (Sections 404 and 409 of ERISA). Section 1104 provides that the fiduciary is to discharge his duty with respect to the plan solely in the interests of the participants and beneficiaries and for the exclusive purposes of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.

Under 29 U.S.C. Section 1109, a fiduciary who breaches any of his responsibilities, obligations, or duties shall be personally liable to the plan to make good for any losses resulting from the breach and to restore any profits to the plan, and shall be subject to such other equitable or

remedial relief as the court deems appropriate, including removal of the fiduciary.

The civil enforcement provisions of ERISA are contained in 29 U.S.C. Section 1132 (Section 502 of ERISA). A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of the plan, to enforce or clarify his rights under the plan, to enjoin any act which violates ERISA or the terms of the plan, for appropriate relief under Section 1109 or Section 1025(c) or for other appropriate equitable relief. A participant or beneficiary may also recover $100 a day from the date of refusal of a fiduciary to comply with a request for information regarding plan procedures. Reasonable attorneys fees and costs are also allowed under Section 1132.

The congressional intent in enacting the enforcement provisions of ERISA was as follows:

> The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcements of fiduciary responsibilities under state law or recovery of benefits due to participants.
>
> 1974 *U.S. Code Cong. and Ad. News* 4639, 4655, 4838, 4871.

Citing 29 U.S.C. Section 1132, the court stated in *Laborers Fringe Benefit Funds v. Northwest Concrete and Construction Inc.*, 640 F. 2d 1350, 1352 (8th Cir. 1981) as follows:

The legislative history underlying Section 502 indicates that Congress intended that the enforcement provisions should have teeth, the provisions should be liberally construed to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act.

Similarly, the court construed Section 1109 in *Gilliam v. Edwards,* 492 F.Supp. 1255, 1266 (D. N.J. 1980) as follows:

> ERISA Section 1109(a) captures Congress' intent to arm the courts with broad remedies for redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of a fiduciary duty . . . . Thus, ERISA grants the court wide discretion in fashioning legal and equitable relief to make the plan whole and protect the rights of beneficiaries.

See also *Hillis v. Waukesha Title Co. Inc.,* 576 F.Supp. 1103, 1108-1109, (E.D. Wis. 1983) (Section 1132); *Freund v. Marshall and Ilsley Bank,* 485 F.Supp. 629, 634, (W.D. Wis. 1979); (Sections 1109 and 1132); *Corley v. Hecht,* 530 F.Supp. 1155, 1163, (D.C.D.C. 1982)(Section 1109); *Lechner v. National Benefit Fund,* 512 F.Supp. 1220, 1221, (S.D. N.Y. 1981) (Section 1132); *Eaves v. Penn,* 587 F.2d 453, 462, (10th Circuit 1978)(Section 1109); *Marshall v. Kelly,* 465 F.Supp. 341, 349 (W.D. Okla. 1978)(Section 1106).

a. Congress intended for federal common law to be developed to further the policy of ERISA

The United States Supreme Court held in *Shaw v. Delta Airline Inc.,* — U.S. —, 77 L.Ed. 2d 490, 500-502, 103 S.Ct. 2890 (1983), that ERISA preempts all state laws

which relate to employee benefit plans, such as those dealing with fiduciary responsibilities. 29 U.S.C. Section 1144. Therefore, ERISA preempts the California state causes of action that a claimant whose benefits are wrongfully denied would have for breach of fiduciary duty, breach of covenant of good faith and fair dealing, breach of the California Insurance Code Section 790.03, and intentional infliction of emotional distress, under which the claimant would be entitled to compensatory damages, damages for emotional distress, and punitive damages. *Egan v. Mutual of Omaha Ins. Co.,* 24 Cal. 3d 809, 157 Cal.Rptr. 482 (1979, *cert. denied,* 445 U.S. 912, 100 S.Ct. 1271, 63 L. Ed.2d 597 (1980), *Delos v. Farmers Insurance Group,* 93 Cal.App.3d 642, 650, 155 Cal.Rptr. 843 (1979), *cert den.* 455 U.S. 912, 100 S.Ct. 1271, 63 L.Ed. 2d 597 (1980), *Fletcher v. Western National Life Insurance Co.,* 10 Cal.App. 3d 658, 89 Cal.Rptr. 843 (1979), *Little v. Stuyvesant Life Insurance Co.,* 67 Cal.App. 3d 451, 463 (1977). The preemption of these remedies creates a void.

Petitioners do not address the void created by the preemption of state law protections, but merely argue that all of the remedies Congress intended to provide for beneficiaries are specifically set forth in ERISA, and no additional remedies should be implied.

As the Ninth Circuit correctly stated in its opinion herein, it would be anomalous for Congress to "occupy the field" with respect to the interests of participants and beneficiaries under pension and benefit plans without providing federal protections and remedies to replace those barred.

Congress clearly intended for the courts to create federal common law to govern various aspects of the em-

ployee benefit field and thus further the policies of ERISA in areas where state protections had been preempted. *Landro v. Glendenning Motorways, Inc.*, 625 F. 2d 1344, 1351, 1356 (8th Cir. 1980). *In re White Farm Equipment Co.*, No. C82-3709 (N.D. Ohio September 20, 1984). The court quoted the legislative history in *In re C.D. Moyer Co. Trust Fund*, 441 F.Supp. 1131, (E.D. Penn. 1977) as follows:

> It is also intended that a body of law will be developed by the courts to deal with the issues involving rights and obligations under private welfare and pension plans. 120 Cong. Rec. 515751 (daily ed. August 22, 1974)

The legislative history indicates that the courts were to create federal common law under ERISA in a similar fashion to the common law developed under Section 301 of the Labor Management Relations Act of 1974. (29 U.S.C. Section 185) 1974 *U.S. Code Cong. and Admin. News*, 5038, 5107. H.R. Conf. Rep. No. 93-1280, 93d Cong. However, this does not mean that identical rules of federal common law were necessarily to apply in claims under ERISA and under the LMRA. *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. 1980). Common law under ERISA was to be developed in accordance with the policies propelling ERISA, namely, to protect the interests of participants and beneficiaries in employee pension and welfare benefit plans. *Corley v. Hecht Co.*, 530 F.Supp. 1155, 1160, 1162 (D.C.D.C. 1982); *Gilliam v. Edwards*, 492 F. Supp. 1255, 1261 (D.N.J. 1980).

In *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 641-643, 68 L.Ed. 2d 500, 101 S.Ct. 2061 (1981), the Supreme Court acknowledged the authority of the courts to fashion federal common law in situations

where it is necessary to protect uniquely federal interests or where Congress empowered the federal courts to create governing rules of law, such as under Section 301 of the LMRA. The Courts may adopt state law in fashioning federal substantive law if the state law is compatible with federal labor policy. *Rehmar v. Smith*, 555 F.2d 1362, 1367-1368 (9th Cir. 1977) (LMRA); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 77 S.Ct. 912, 1 L.Ed. 2d 972 (1957) (LMRA).

The court addressed this issue in the context of ERISA in *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 426 F.Supp. 316 (N.D. Ind. 1977) as follows:

> Where the courts are required themselves to fashion a federal rule of decision, the source of that law must be federal and uniform. Yet, state law where compatible with national policy may be resorted to and adopted as a federal rule of decision. [citation] Here, of course, there is little federal law to which the court may turn for guidance. State regulation of insurance, pensions, and other such programs, however, provides a pre-existing source of experience and experiment in an area in which there is, as yet, only federal inexperience. Much of what the states have thus far developed, particularly in the insurance field, is statutory. In certain areas of public concern, the state legislatures have been quite active in enacting comprehensive regulatory schemes, and state statutory sources of law will no doubt play a major role in the development of a federal common law under ERISA, particularly in defining rights under employee benefit plans.

See also, *Wayne Chemical, Inc. v. Columbus Agency Service Corporation*, 567 F.2d 692, (7th Cir. 1977) which mod-

ified the district court ruling but without dislodging the operative "federal common law" principles espoused in the lower court opinion, and *In re White Farm Equipment Co.,* No. C82-3709 (W.D. Ohio September 20, 1984).

The Supreme Court stated in *Sullivan v. Little Hunting Park,* 396 U.S. 229, 239-40, 24 L.Ed. 2d 386, 90 S.Ct. 400 (1969), in the context of housing discrimination, that where legal rights have been invaded, and a federal statute provides for the general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. The existence of a statutory right implies the existence of all necessary and appropriate remedies. Both federal and state rules on damages may be utilized, whichever better serves the policies of the federal statute.

b. Participants may recover damages on their own behalf for breaches of fiduciary duty under Section 1109

29 U.S.C. Section 1109 (a) states as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this Act.

Petitioners contend that Section 1109 does not authorize any relief whatsoever on behalf of individual participants or beneficiaries. They contend that Section 1109 makes relief available only to plans as a whole for breaches of fiduciary duty in the management or investment of plan assets (page 12). Petitioners argue that a beneficiary or participant is only entitled to the relief authorized in Section 1132, to recover benefits due under the terms of the plan or to enforce or clarify his rights under the plan.[1]

Nowhere in the language of Section 1109 or Section 1132 or in the legislative history of ERISA is it specified that *only* the plan may recover under Section 1109, or that beneficiaries and participants are limited to the remedies specified in Section 1132.

Petitioners argue that the language of Secti[illegible]09 should be strictly construed and remedies should [illegible] be implied beyond those expressly provided by Congress. However, it was the intent of Congress that the provisions of ERISA be construed liberally to provide benefi-

1. Petitioners argue that the only penalty for failure to comply with the time limit specified in 29 CFR Section 2560.503 is that the claimant may treat the failure to comply as a denial for purposes of exhausting administrative remedies, relying on *Richardson v. Central States Pension Fund,* 2 EBC 1477 (8th Circuit 1981). This argument is unsupported and absurd. The issue in *Richardson* was whether the conclusionary decision of a Board of Trustees was sufficient to comply with Section 2560.503. The court merely restated the language of Section 2560.503(4) that failure to comply with mandatory time limits may be treated as a denial, but did not state this was the only result of failure to comply. Significantly, the Eighth Circuit found in favor of the beneficiary, stating as follows:

> The statute and the regulations were intended to help claimants process their claims efficiently and fairly; they were not intended to be used by the fund as a smoke screen to shield itself from legitimate claims.

ciaries and participants with broad remedies for redressing or preventing violations of the Act. *Gilliam v. Edwards,* 492 F.Supp. 1255, 1266 (D.N.J. 1980); *Corley v. Hecht,* 530 F.Supp. 1155, 1163 (D.C.D.C. 1982).

The courts have consistently interpreted the preemption provision of ERISA in its broadest sense, *Shaw v. Delta Airlines, Inc.,* — U.S. —, 77 L.Ed. 2d 490, 502, 103 S.Ct. 2890 (1983); *National Carriers' Conference Committee v. Heffernan,* 454 F.Supp. 914, (D. Conn. 1978); *Azzaro v. Harnett,* 414 F.Supp. 473, 474 (S.D.N.Y. 1976); with the result that all state protections and remedies for participants or beneficiaries have been barred by ERISA.[2] It would be inequitable to construe the preemption provisions broadly but construe the remedies provisions strictly, thus foreclosing the rights of beneficiaries and participants.

Section 1132 specifically allows beneficiaries to sue under Section 1109. However, even if it did not, a private right of action for participants and beneficiaries could be read into Section 1109. The primary factor to be considered in deciding whether a private right of action should be implied is whether Congress intended that the provisions of the statute be enforced through private litigation.[3] The courts have listed four factors relevant to whether a private right of action should be implied:

(1) Was the statute enacted for the benefit of the class seeking relief?

(2) Did the legislative history declare an intent to create or deny such a remedy for participants?

(3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? and,

(4) Are the remedies sought traditionally relegated to state law in an area basically the concern of the States so that it would be inappropriate to infer a cause of action based solely on federal law? *Cort v. Ash,* 422 U.S. 66, 78, 45 L.Ed. 2d 26, 95 S.Ct. 2080 (1975); *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 26, 62 L.Ed. 2d 146, 100 S.Ct. 242 (1979); *California v. Sierra Club,* 451 U.S. 287, 292-3, 68 L.Ed. 2d 101, 101 S.Ct. 1775 (1981); *Osborn v. American Ass'n of Retired Persons,* 660 F.2d 740, 743 (9th Cir. 1981).

The first prong of the test is met in that ERISA's stated purpose was to provide additional protection and security for participants and beneficiaries and to ensure that they receive their benefits.

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2. A reading of 29 U.S.C. Section 1144(a) in conjunction with Section 1144(c) (2) would lead a strict constructionist to the conclusion that the "purports to" language of Section 1144(c) (2) defining "State" means only those laws that "intend to" regulate benefit plans should be preempted by ERISA. The "purports to" language would be considered a much stronger indicia than the "relates to" language contained in Section 1144(a).

3. The over fifty million individuals covered under private pension plans and welfare benefit plans (Brief of Petitioner at p.24) have little hope that plan fiduciaries and administrators will be controlled, regulated, and policed by the Secretary of the Department of Labor. Rather than foisting the obligations to police this massive industry on the Secretary of the Department of Labor, a task that would require a department practically the size of all insurance departments of all fifty states, the Congress surely must have intended that this regulation and policing come from participants and beneficiaries.

With regards to the second factor, the legislative history is silent as to the remedies a participant has against fiduciaries of benefit plans who breach their duties to said participants.[4]

The third criteria is whether a private right of action is consistent with the underlying legislative scheme. ERISA was developed to more fully protect participants and beneficiaries. The underlying purpose of ERISA would, therefore, be better served by implying remedies for participants rather than implying immunity for fiduciaries.

With regards to the fourth prong, which is whether the remedies sought are traditionally the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law, state law has been completely preempted by ERISA. Congress intended for the courts to create federal common law to fill in the gaps left by ERISA's express provisions. Therefore, it would be appropriate for the courts to imply a private right of action with broad remedies for beneficiaries and participants under Section 1109.[5]

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4. The silence may be explained in part by the title of the Act itself, namely, the Employee *Retirement* Income Security Act. The main focus of Congress was on retirement plans rather than on benefit plans.

5. If Petitioners' strict construction of Section 1109 that only plans are allowed to collect damages from fiduciaries, were followed, it would create the absurd situation wherein an employer with a self-funded and self-administered benefit plan would be responsible (as a fiduciary) for paying itself (as a plan) for any gains or benefits it received at the expense of the plan participants.

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Petitioners argue that the court should not imply remedies beyond those expressly provided in ERISA because it is a "comprehensive legislative scheme". ERISA is a complicated and elaborate legislative scheme, but its focus is not upon the administration of benefit plans or the remedies available for wrongful conduct of fiduciaries in handling claims for benefits. Indeed, it is clear from the legislative history that Congress was primarily concerned with correcting abuses in vesting, funding, and disclosure of retirement plans.[6] ERISA is far from comprehensive with regards to the remedies for breach of fiduciary duty in the handling of benefit claims or other violations against participants by fiduciaries.

The Supreme Court noted in *Cannon v. University of Chicago,* 441 U.S. 667, 711, 60 L.Ed. 2d 560, 99 S.Ct. 1946 (1979), where it implied a private right of action under Title IV for a victim of sex discrimination, that the argu-

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A strict construction of the remedies available under Section 1109 would also force participants to subordinate or forfeit their rights for a more worthwhile "common good". The "common good" set forth by Petitioners appears to be the immunization and shielding of fiduciaries and purported smoother administration of plans due to the fiduciaries' peace of mind. Nowhere in the language of the statute or in the legislative history is there any reference to participants sacrificing legal protections for a more worthwhile common good much less for the purpose of shielding fiduciaries from liability.

6. The Act sets forth in great detail specific reporting and disclosure requirements, vesting standards and participation requirements and funding requirements of retirement plans. None of these provisions apply to benefit plans. ERISA is almost void of any mention of fiduciary responsibility in administering benefit plans. It is therefore not that surprising that there is nothing in the legislative history which indicates that compensatory or punitive damages are not recoverable by participants against fiduciaries in appropriate circumstances.

ment that other provisions of a complex statutory scheme create express remedies is not a sufficient reason to refuse to imply an otherwise appropriate remedy under a separate section. See also *Touche Ross & Co. v. Redington,* 442 U.S. 560, 582, 61 L.Ed. 2d 82, 99 S.Ct. 2479 (1979) (dissent of Justice Marshall).

c. The courts must imply protections for beneficiaries of self-funded and self-administered plans

There are basically three types of funding systems for ERISA benefit plans, namely, Taft-Hartley plans, insurance funded plans, and self-funded plans. Beneficiaries of Taft-Hartley multi-employer plans are protected by the provisions of the LMRA and by the collective bargaining system. As pointed out in the briefs of the amici curiae, Taft-Hartley plans are jointly administered by an equal number of representatives of management and representatives of labor. Fiduciaries receive no pay for their duties and have no incentive to act adversely to beneficiaries. The funds are totally segregated and independent. Contributing employers pay specified amounts into the fund from which benefits are distributed by the neutral trustees. It is impossible for an employer or trustee to benefit personally from wrongfully denying benefits (29 U.S.C. Section 186(c)).

Most of the amici curiae in support of petitioner represent Taft-Hartley plans. As pointed out by amicus curiae Steelworkers Union, Taft-Hartley plans with their built-in safeguards are not typical of ERISA plans and cover only about 25% of welfare benefit plan participants.

Insurance funded plans lack the protections of the LMRA, but are subject to state insurance regulations and

remedies, which are not preempted by ERISA (29 U.S.C. Section 1144(B)). *Eversole v. Metropolitan Life Insurance,* 500 F.Supp. 1162, 1170 (C.D. Cal. 1980). The employer pays premiums to the insurance company which handles claims for benefits and determines which claims are paid. The insurance company may be liable under state law for bad faith for compensatory and/or punitive damages for wrongfully denying a claim or for intentional infliction of emotional distress for outrageous conduct. *Fletcher v. Western National Life Insurance Co.,* 10 Cal. App. 3d 658, 89 Cal.Rptr. 843 (1979); *Egan v. Mutual of Omaha Insurance Company,* 24 Cal. 3d 809, 169 Cal.Rptr. 691, *cert. den.* 445 U.S. 912, 100 S.Ct. 1271, 63 L.Ed. 2d 597 (1980).

Beneficiaries of self-funded plans, however, lack comparable protections. The employer administers the plan and pays the benefits, often directly from the employer's general fund. The employer, thus, directly benefits whenever a claim is denied. Even when a separate fund is set aside by the employer, the employer can still reap rewards for wrongful denial of claims because the law requires only that the fund be maintained at a given level based upon actuarial computations. (29 U.S.C. Section 1082). If fewer payments are made to beneficiaries, the employer's funding requirements will be reduced.

The trustees of self-funded plans are generally employees who are often in a conflict of interest position, acting under the guidance and control of the employer. Although, the fiduciaries may not have a personal financial interest in denying claims, as employees they have much to gain in status, benefits, salary increases, and job security by acting in the interest of the employer rather than

the beneficiaries. *Leigh v. Engle,* 727 F.2d 113, 127 (7th Cir. 1984).

Section 1106(b) of ERISA sets forth clearly that a fiduciary may not act in the interests of the employer or in his own interest. However, ERISA sets forth no specific remedies for a beneficiary who is injured when a fiduciary does not act in the interests of the beneficiary. The courts should fashion remedies based on the common law of torts and bad faith insurance law to protect beneficiaries.

If the Court were to accept petitioners' position that participants have no rights or remedies against fiduciaries under Section 1109, then participants of self-funded plans who lack the built-in safeguards afforded under the Taft-Hartley plans and who lack the state remedies available under plans funded and administered by insurance companies, would be unprotected. ERISA was enacted specifically to protect participants against just such self-dealing situations and not to act as a shield for employers who are acting as fiduciaries.

d. It was not the intent of Congress to immunize fiduciaries from liability for breach of fiduciary duty

Petitioners contend that it was the intent of Congress that beneficiaries and participants not be allowed to recover damages from fiduciaries for their breaches of duty. However, Petitioners cite no authority to the effect that ERISA fiduciaries should have an immunity not accorded to fiduciaries in other capacities.

Petitioners base much of their argument for the unavailability of damages on the fact that ERISA was based

on the law of trusts. However, it is well-established in common trust law that a fiduciary is subject to liability to his beneficiary for harm resulting from a breach of duty imposed by the fiduciary relation.[7] In Restatement of the Law, Torts (2d) Section 874, it is stated:

> One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.

Comment b to Section 874 provides in pertinent part as follows:

> A fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act. The local rules of procedure, the type of relation between the parties and the intricacy of the transaction involved, determine whether the beneficiary is entitled to redress at law or in equity. The remedy of a beneficiary against a defaulting or negligent trustee is ordinarily in equity; the remedy of a principle against an agent is ordinarily at law. However, irrespective of this, the beneficiary is entitled to tort damages for harm caused by the breach of duty arising from the relation, . . .

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7. Judge Cardozo stated in *Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545 (1928) as follows:

> "Many forms of conduct permissible in a work-a-day world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.

There is nothing in the language of ERISA or the legislative history to indicate that these well-established principles should not apply to ERISA fiduciaries.

In fact, ERISA fiduciaries may be held to a higher standard of conduct than required under traditional trust law. In *Eaton v. D'Amato,* 581 F.Supp. 743 (D.C. 1980), the court noted that it was the intent of Congress to expand the scope of fiduciary standards of conduct to assure adequate protection for the interests of plan participants and beneficiaries. See also *Eaves v. Penn,* 587 F.2d 453, 457 (10th Cir. 1978); *Marshall v. Kelly,* 465 F.Supp. 341, 349 (W.D. Okla. 1978), *U.S. Code Cong. and Admin. News,* 4639, 5186 (93 Cong. 2d Sess. 1974).

Fiduciaries of ERISA plans may be held to a higher standard of duty than the "arbitrary and capricious" standard usually applied to trustees. *Rehmar v. Smith,* 555 F.2d 1362, 1371 (9th Cir. 1976). In *Struble v. N.J. Brewery Emp. Welfare Trust Fund,* 732 F.2d 325, 333-4 (3rd Cir. 1984), the court stated that the strict standard applies where it is alleged that fiduciaries have sacrificed valid interests to advance the interests of non-participants. Fiduciaries of self-funded plans are scrutinized even more carefully because they place themselves in a position with inherent opportunities for self-dealing and conflict of interest. *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir.) *cert. den.* 459 U.S. 1069 (1982); *Freund v. Marshall & Ilsley Bank,* 484 F.Supp. 629, 639-44 (W.D. Wis. 1979); *Corley v. Hecht Co.,* 530 F.Supp. 1155 (D.D.C. 1982); *Leigh v. Engle,* 722 F.2d 113, 132 (7th Cir. 1984); *Viggiano v. Shenango China,* 574 F.Supp. 861, 866-67 (W.D. Pa. 1983). See generally *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329-331, 101 S.Ct. 2789, 69 L.Ed. 2d 672 (1981).

An analysis of the law of trusts and case law under ERISA as well as the legislative history makes it very clear that ERISA fiduciaries are held to a high standard of fiduciary conduct and are liable for tort damages just like any other fiduciary when they breach their duties.

2. There is extensive support in the legislative history and language of ERISA for the availability of compensatory damages.

The congressional intent as evidenced in both the Senate and House reports was to provide for the full range of legal and equitable remedies available in both state and federal courts. Legislative History of Employee Retirement Act of 1974, Vol. III, at 4838 and 4871. Petitioners argue, however, that only equitable relief is available under ERISA and therefore compensatory damages may not be recovered.

Even if ERISA did only allow equitable relief, it would still provide for the equitable remedy of restitution to make the claimant whole and to restore the status quo. *Rogers v. Loether,* 467 F.2d 110 (7th Cir. 1972), *Marshall v. Kelly,* 465 F.Supp. 341, 354 (W.D. Okla. 1978), *Hillis v. Waukesha Title Co., Inc.,* 576 F.Supp. 1103, 1108 (E.D. Wis. 1983). In a discussion of the "make whole" provisions of Title VII, the Supreme Court stated as follows in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 45 L.Ed. 2d 280, 95 S.Ct. 2362 (1975):

> Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief . . . And where a legal injury is of an economic character, the general rule is, that when a wrong has been done, and the law gives a remedy,

the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

Furthermore, Section 1109 specifically provides for equitable or *remedial* relief for a breach of fiduciary duty. "Remedial relief" can mean legal relief, relief to remedy a wrong or an abuse, or relief to compensate an injured party. *Black's Law Dictionary.* 82 C.J.S. 918 (Statutes Section 388). If only equitable relief were provided, the statute would not have opposed the term "remedial" to "equitable". Therefore, in order to avoid having the term "remedial" be mere surplusage, it should be read that Section 1109 provides legal relief as well as equitable relief against fiduciaries.

The legislative history makes clear that ERISA was intended to be a remedial statute,[8] to correct and deter abuses in the administration of benefit and pension plans and to provide broad remedies for participants and beneficiaries. It would be inconsistent with this policy to limit remedies to equitable relief. Furthermore, several courts have specifically held that the use of the term "remedial" in Section 1109 authorizes legal relief. ***Bobo v. 1950 Pension Plan,*** 548 F.Supp. 623, 626 (W.D.N.Y. 1982); ***Gilliam v. Edwards,*** 492 F.Supp. 1255, 1266-7 (D.N.J. 1980); ***Donovan v. Robbins,*** 99 F.R.D. 593, 599 (N.D. Ill. 1983).

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8. A remedial statute is one that intends to afford a private remedy to a person injured by a wrongful act, one that is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good, or one giving a party a mode or remedy for a wrong, where he had none, or different one, before. *Black's Law Dictionary.*

Congress failed to specify what types of appropriate equitable and remedial relief would be allowed under Section 1109 and Section 1132. However, it may be presumed that at the time of the enactment of ERISA in 1974, Congress was well aware of the remedies available under breach of fiduciary duty causes of action, including the availability of compensatory and punitive damages. *Carey v. Piphus* 435 U.S. 247, 260, 98 S.Ct. 1042, 1049, 55 L.Ed. 2d 252 (1978).

Section 874 of the Restatement of Laws, Tort 2d, states that breach of fiduciary duty is a tort entitling the one aggrieved to full compensation for all damages proximately resulting from the breach of duty. These may include compensatory and punitive damages resulting from the breach of duty. Section 874A provides for tort liability for violation of legislative provisions, with the following:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

ERISA constitutes the enactment of a statutory law of fiduciary duty. Consonant with the statutory enactment should be full and complete tort liability for breach of the fiduciary duty embodied in ERISA.

Petitioners make much of the distinction between equitable and legal relief to support their contention that compensatory and punitive damages are unavailable. Although under the English common law, courts of equity had jurisdiction over trusts, this distinction between courts of law and courts of equity has become archaic and they have merged. Petitioners' reliance on this formalistic distinction is misplaced.

Numerous cases have, in fact, held that compensatory damages are available under ERISA to remedy the wrong, make the aggrieved individual whole or compensate him for mental or emotional distress. *Free v. Gilbert Hodgman Inc.*, 3 Empl. Ben Case (BNA) 1010, 1012 (N.D. Ill. 1982), *Bobo v. 1950 Pension Plan*, 548 F.Supp. 623, 626 (W.D. N.Y. 1982), *Eaton v. D'Amato*, 581 F.Supp. 734 (D.C. 1980), *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303, (8th Cir. 1984), *Bittner v. Sadoff and Rudoy Industries*, 490 F.Supp. 534, 536 (E.D. Wis. 1980), *UAW v. Federal Forge*, 583 F.Supp. 1350 (W.D. Mich. 1984).[9]

The court held that compensatory damages are recoverable under ERISA in *Jiminez v. Pioneer Diecasters*, 549 F.Supp. 677, 681 (C.D. Cal. 1982), stating as follows:

> To hold that a plan participant or beneficiary can never recover punitive or compensatory damages would immunize plan fiduciaries from liability for their intentional breaches of duty that injure plan participants and beneficiaries. Such a result is inconsistent with the express policy of ERISA.

9. Petitioners cite the case of *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825 (7th Cir. 1984), where the court held the ERISA conferred, under Section 1132, no right to sue in state court for mental suffering caused by a violation of the terms of the plan. Petitioners also rely on the case *Hurn v. Retirement Fund Trust*, 424 F.Supp. 80 (C.D. Cal. 1976), where the court also found in a conclusion of law that no damages for emotional distress are available under 1132. The Ninth Circuit in its opinion here found that compensatory damages are available under Section 1109 and therefore is not in conflict with the cases cited by Petitioners.

3. The availability of punitive damages is in accord with the policy of ERISA

a. Punitive damages should be allowed to redress and prevent violations of ERISA

The opinion of the Ninth Circuit that punitive damages are available under ERISA is based upon the legislative history, the policy of ERISA, and numerous case authorities. Congress intended to provide broad legal and equitable remedies for redressing or preventing violations of the Act. 1974 *U.S. Code Cong. and Ad. News*, 4639, 4655, 4838, 4871. The availability of punitive damages serves the important purpose of deterring and redressing violations of ERISA.[10]

Petitioners contend that the failure of Congress to mention the availability of punitive damages to employee

10. As the Supreme Court observed in *Day v. Woodworth*, 4 U.S. 363, 371, it was already well established in 1851, and had been so for more than a century before, that in all actions for torts a jury might inflict exemplary, punitive, or vindictive damages upon a defendant having in view the enormity of the wrongful conduct involved. Actually, the origin of the doctrine can find its roots established well before evolution of the English Common law. For example, in the Bible, Old Testament there is the statement:

> For every breach of trust, whether it is for ox, for ass, for sheep, for clothing, or for any kind of lost thing, of which one says, "This is it," the case of both parties shall come before God; he whom God shall condemn shall pay double to his neighbor. (Exodus 22:9)

benefit plan beneficiaries in actions under ERISA means that Congress must have intended not to allow the recovery of such damages. However, Congress failed to specify any type of relief which is available under Section 1132(a)(2) with regard to actions for appropriate relief under Section 1109. Congress must have expected the courts to fashion appropriate relief based on common law and state law, which would include punitive damages where it would further the policies of ERISA. If Congrass had indeed intended not to allow the recovery of punitive damages by beneficiaries for the tortious conduct of fiduciaries, then Congress quite easily could have so stated by providing that the full range of remedial and equitable relief otherwise available under Section 1109 would not include punitive damages.

It is well-established that punitive damages are available for breach of fiduciary duty under state law and common law. Punitive damages were awarded for breach of fiduciary duty in *Palmer v. Fuqua,* 641 F.2d 1146, 1160-61 (5th Cir. 1981) and *Financial General Bankshare Inc. v. Metzger,* 523 F.Supp. 744, 773-74 (D.D.C. 1981). Under California law, punitive damages have long been available under trust law for breach of fiduciary duty. *Clapp v. Vatcher,* 9 Cal.App. 462, 99 P. 549 (1908). In *Wershkull v. United California Bank,* 85 Cal.App. 3d 981, 149 Cal. Rptr. 829 (1978), and *Hannon Engineering, Inc. v. Strom Industries, Inc.,* 126 Cal.App. 3d 415, 179 Cal.Rptr. 78 (1981), punitive damages were allowed against fiduciaries of pension funds.

Punitive damages have also been allowed in a number of cases under ERISA. In *Eaton v. D'Amato,* 581 F.Supp. 743 (D.C. 1980), the court held that punitive damages are

available under Section 1109 where there has been a willful, malicious, or outrageous breach of fiduciary duty. Other cases allowing punitive damages include *Winterrowd v. David Freedman and Co., Inc.,* 724 F.2d 823 (9th Cir. 1984), *Jiminez v. Pioneer Diecasters,* 549 F.Supp. 677 (C.D. Cal. 1982), and *Kann v. Keystone Resources, Inc.,* 575 F.Supp. 1084 (W.D. Pa. 1983).[11]

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11. Respondent is aware that a number of courts have refused to allow punitive damages in their analysis of ERISA. However a distinguishing factor is that most of the analysis deals with the availability of punitive damages under 29 U.S.C. Section 1132. *Dependahl v. Falstaff Brewing Corporation,* 653 F.2d 1208 (8th Circuit 1981); *Calhoun v. Falstaff Brewing Corporation,* 478 F.Supp. 357 (E.D. Mo. 1979); *Hurn v. Retirement Fund Trust,* 424 F.Supp. 80 (C.D. Cal. 1976); *Bell v. Southern Oregon Log Scaling Bureau,* 1 EBC 1438 (D. Or. 1976); *Meyer v. Phillip Morris Inc.,* 569 F.Supp. 1510 (E.D. Mo. 1983); *Hechenberger v. Western Electric Co. Inc.,* 570 F.Supp. 820 (E.D. Mo. 1983); *Hoskins v. Retirement Plan of Standard Oil Company,* No. 78 C 3670 (N.D. Ill. 1983).

Other cases not allowing recovery of punitive damages may be distinguished by the fact that the punitive damages which were refused were sought against the plan. *Maxfield v. Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds,* 559 F. Supp. 158 (N.D. Ill. 1982); *Diano v. Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds,* 551 F.Supp. 861 (N.D. Ohio 1982).

Other cases reject the availability of punitive damages under sections other than Section 1132 or Section 1109 *Meyer v. Phillip Morris, Inc.,* 575 F.Supp. 1232 (E.D. Mo. 1983) (Section 1024 analysis) *Wilke v. Morton Thiokol, Inc.,* No. 84 C 1352 (N.D. Ill., June 26, 1984) (Section 1140 analysis).

Several cases failed to analyze ERISA at all so it is impossible to determine upon what basis the court determined that punitives are unavailable under ERISA. *Sheahan v. Leahy, etc.,* No. 84-1833C(B)(E.D. Mo. August 23, 1984); *Lewis v. Fulton Federal Savings and Loan Pension Plan,* 4 EBC 2071 (N.D. Ga. 1983); *Zittrouer v. Uarco Incorporated Group Benefit Plan,* 582 F.Supp. 1471 (N.D. Ga. 1984)

Only *Whitaker v. Texaco, Inc.,* 566 F.Supp. 745 (N.D. Ga. 1983) directly addresses the issue before this Court by analyzing Section 1109. However the Courts reading of the language of

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The 8th Circuit affirmed the allowance of punitive damages for fraud under ERISA in *Monson v. Century Mfg. Co.*, 734 F.2d 1293, 1305, (8th Cir. 1984). Congress clearly contemplated a civil action for fraud because ti specified a particular statute of limitations for fraud in Section 1113. Punitive damages are routinely available under state and common law for fraud. If Congress did not intend to allow them it surely would have so stated.

Petitioners contend that punitive damages should not be available under ERISA because ERISA contains elaborate requirements and makes extensive use of penal and criminal relief to accomplish its objectives. There are penalties for fiduciaries who fail to provide documents (29 U.S.C. Section 1132(c)), engage in prohibited transactions or mismanage assets of a fund (29 U.S.C. Section 1106), as well as for employers who fail to make contributions to multi-employer plans (29 U.S.C. Section 1106). ERISA also contains criminal penalties for willful violations of the reporting and disclosure provisions of the Act (29 U.S.C. Section 1131) and for willful interference with a beneficiary's exercise of rights under a plan (29 U.S.C. Section 1131). However, these criminal provisions are very rarely enforced. Respondents have found only one reported case where a fiduciary was convicted of misconduct. *U.S. v.*

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Section 1109 incorrectly limits the language "equitable or remedial" to mean only equitable. Furthermore, a number of these cases are called into question by the holdings of the Eighth Circuit in *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (1984) and of the Ninth Circuit in *Winterrowd v. David Freedman and Co. Inc.*, 724 F.2d 823 (1984) that punitive damages are available under ERISA.

Snyder, 668 F. 2d 686 (2nd Cir. 1982), which involved embezzlement over one million dollars in plan assets.

None of these provisions would effectively deter a fiduciary or employer from wrongfully denying a claim for benefits or from acting in bad faith towards a beneficiary. It was the stated purpose of ERISA to protect participants and beneficiaries. It would further this purpose to allow punitive damages against fiduciaries for malice, bad faith conduct, or wanton indifference to the rights of a beneficiary or participant.

b. The availability of punitive damages will not have deleterious consequences

Petitioners contend that the availability of punitive damages against fiduciaries will have a widespread deleterious impact on the conduct of fiduciaries. They contend that fiduciaries may feel compelled to process or settle unjustified claims out of fear of punitive awards against them, thus transgressing the principles of prndence and reasonableness to the financial detriment of the plan. Petitioners also express concern that qualified individuals will be deterred from serving as fiduciaries because of the possibility of personal liability.[12]

The opinion of the Ninth Circuit herein held that punitive damages may be available only in very limited circumstances where the fiduciary acts with actual malice or wanton indifference to the rights of a participant or beneficiary. The Ninth Circuit stressed this limitation

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12. The Supreme Court rejected similar arguments in *Cannon v. University of Chicago*, 441 U.S. 677, 709, 601 Ed. 2d 560, 99 S. Ct. 1946 (1979) (Title IX).

again in *Winterrowd v. Freedman & Co.,* 724 F. 2d 823 (9th Cir. 1984). An ERISA fiduciary acting prudently and in good faith would have no need to worry about personal liability for punitive damages. Like any other fiduciary, an ERISA fiduciary would only be liable for willful, malicious, outrageous, or wanton conduct. Punitive damages would serve as an appropriate deterrent for fiduciaries who were inclined to abuse the fiduciary relationship, act adversely to participants and beneficiaries, or commit intentional tortious acts. It was surely not the policy of ERISA to protect such fiduciaries from liability for their tortious acts.

Petitioners urge that the allowance of compensatory and punitive damages in ERISA cases will have a severe and adverse impact on the administration of employee benefit plans. However, the impact of the availability of these damages on the administration of employee benefit plans will not be an adverse one. On the contrary, ERISA fiduciaries will be compelled to bring their conduct into accordance with the requirement of Section 1104 to act solely in the best interests of the participants and beneficiaries. The understanding that compensatory and punitive damages could be available to any plan participant or beneficiary whose claim is not timely processed and paid, or is denied on the basis of false, fraudulent, misleading, or otherwise tortious conduct, will force ERISA fiduciaries to process claims on the basis of accurate investigations and complete information, and under the precise terms of the plan in

question. It will deter fiduciaries of self-funded plans from acting adversely to the interests of the participants for their own financial gain or to further their own business interests.

Petitioners express concern that plan fiduciaries will sacrifice the interests of the plan by paying questionable claims out of fear of punitive damages. It is extremely doubtful that this might occur. In fact, given good, sound claims processing functions and investigatory abilities, questionable claims become less questionable; and payable claims remain payable. Claims utterly lacking in merit will not become meritorious simply because a thorough investigation has been done surrounding the merits of the claim. With regard to unmeritorious claims, it is foreseeable that there will be some individuals unwilling to accept unfavorable decisions on their claims who will file lawsuits and seek punitive damages. However, the simple prospect that such a person with an unmeritorious claim might seek to recover punitive damages does not warrant foreclosing the possibility of awarding punitive damages in appropriate cases to deter and punish outrageous conduct on the part of fiduciaries.[13]

Petitioners also argue that employee benefit plans may be reluctant to correct their own errors in fear that

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13. The possibility of large punitive damage awards should not justify the abandonment of the objectives of the statute or a weapon to protect participants. In addition, practically all of the large punitive damages verdicts in the insurance bad faith cases in California have been reduced, vacated, or otherwise limited; or where they have stood, the massive wealth of the defendant is such that even a million dollar verdict can be borne by the sufferance of merely a week's income. See *Pistorius v. Prudential Insurance Co.,* 123 Cal. App. 3d 541, 176 Cal. Rptr. 660 (1981).

this action would lay the groundwork for a punitive damages claim. This contention, as with the others proferred by Petitioners, seems to concede that plan fiduciaries do indeed commit tortious acts during the denial of otherwise legitimate claims, but to argue that they should not be held liable for them.[14] It was surely not the policy of ERISA to allow fiduciaries to refuse to correct errors which cause financial and emotional harm to beneficiaries for the sake of their own self-interest in not being sued. Furthermore, the fiduciary could prove his good faith by reversing an erroneous denial on review and thus avoid any basis for a claim for punitive damages.

Petitioners emphasize that the intent of Congress was to provide a non-adversarial method of claims settlement, arguing that the availability of compensatory and punitive damages will frustrate legitimate claims settlement. This contention seems to assume that plan beneficiaries deliberately disable themselves in order to set up compensatory and punitive damage claims. When a person has become disabled and submits a claim for disability benefits, he is unable to protect himself and needs a bona fide fiduciary looking after his interests. The claimant must repose trust and confidence in the claims processor to accurately assimilate all of the medical and other pertinent information, and to make a determination regarding the availability of

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14. When mistakes are made, they simply must be corrected even at the expense of possible financial exposure beyond the mere entitlement to benefits. To do otherwise would do nothing more than lend express approval not only of the commission on intentionally tortious acts in the processing of benefit claims, but also the right to cover up that intentionally tortious conduct and refuse to learn from it in order to prevent abuses during the course of benefit claims processing. This simply cannot have been the intent of Congress in enacting ERISA.

disability benefits which is consistent not only with the medical information and the facts, but also with the law and the terms of the plan itself. A disabled claimant cannot be expected to wait in uncertainty for months without any income while a plan fiduciary denies an otherwise legitimate claim on the basis of misinformation, medical information which is in favor of the plan's viewpoint, or a self-serving construction of the benefit plan itself. ERISA fiduciaries simply cannot expect to be allowed to take unfair advantage of those otherwise unable to protect themselves.

Further, with regards to Petitioners' contention that the availability of punitive damages will discourage settlement on the part of claimants, it is as likely that the fiduciaries of a plan will be less inclined to compromise claims short of a lawsuit when they realize that the most the plan stands to lose in a lawsuit is the amount of the benefits denied. *Vasquez v. Eastern Airlines, Inc.*, 579 F.2d 107 (1st Cir. 1978) (ADEA).

In any case, the prompt, fair, and equitable payment of legitimate claims would obviate the ability of a participant to even make the argument for compensatory or punitive damages.

Petitioners also contend that the availability of punitive damages will result in a proliferation of litigation in the federal court. A similar argument in the context of actions for sex discrimination was rejected by the Supreme Court in *Davis v. Passman*, 442 U.S. 228, 248, 60 L. Ed.

2d 846, 99 S. Ct. 2264 (1979) on the basis that concern for conservation of judicial resources should not stand in the way of recognizing usually protected interests.

Considering the limited circumstances under which punitive damages would be available, it is very unlikely that a flood of unnecessary litigation would occur. Furthermore, ERISA provides for attorneys fees to the prevailing party. Thus claimants cannot pursue doubtful or frivolous litigation with impunity.

Petitioners argue that exposure of benefit plans to compensatory and punitive damages would endanger the financial soundness of benefit plans. Similar arguments were rejected by the court in *Wadsworth v. Whaland,* 562 F.2d 70, 78 (1st Cir. 1977) and *Eaton v. D'Amato, supra.* While protection of the financial soundness of plans is one of the aims of ERISA, the primary aim of ERISA is to protect the rights of beneficiaries. If one were to follow Petitioners' argument to its logical extension, one could argue that it would be in the best financial interests of the plan to never pay any benefits at all until sued. The intent of ERISA is to protect the financial souundness of plans for the sake of beneficiaries, not at the expense of beneficiaries. *Dist. 17, Dist. 29, Local U. 7113 v. Allied Corp.,* 735 F.2d 121, 133-4, (4th Cir. 1984).

Furthermore, the issue to be reviewed herein is not whether punitive damages should be available against the plan itself, but against the fiduciaries personally. Fiduciaries should not be able to use ERISA as a shield to protect them from liability for their wrongful acts toward participants.

4. Analogy to other Federal Labor Statutes indicates that compensatory and punitive damages should be available under ERISA.

Petitioners have analogized ERISA to the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. Section 185[a]), Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e *et seq.*), and the Age Discrimination in Employment Act (ADEA), (29 U.S.C. Section 621 *et seq.*) claiming that compensatory and punitive damages are not available under the LMRA, Title VII, or the ADEA.

The House Conference Report on ERISA stated that ERISA actions are to be regarded as arising under the laws of the United States in a similar fashion to those brought under the LMRA. 3 *U.S. Code Cong. & Ad. News* 5106 (1974). Like ERISA, the LMRA addresses itself primarily to disclosure and reporting requirements rather than to the rights and remedies of beneficiaries for wrongful denial of benefits. Significantly, the provisions of the LMRA do not exempt or relieve any person from any liability, duty or penalty provided by state law. (Section 309).[15]

Since ERISA was patterned by Congress after the LMRA, the intent must have been to provide participants and beneficiaries with greater protection and additional remedies not heretofore available and not to deprive par-

15. In *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25,* 430 U.S. 290, 304-7 (1977), the Supreme Court held that emotional distress could be available under state law in a labor context where there was outrageous conduct apart from union discrimination in employment opportunities.

ticipants and beneficiaries of remedies which would have been available if ERISA had not been enacted.

Furthermore, compensatory damages have been allowed under the LMRA where there was outrageous conduct on the part of the union. The Eighth Circuit permitted a cause of action for mental distress arising from intentional union discrimination in *Richardson v. Communication Workers of America,* 443 F.2d 974, 984-5 (8th Cir. 1971). Similarly, in *Farmer v. ARA Services, Inc.,* 660 F. 2d 1096, 1107 (6th Cir. 1981), the Sixth Circuit held that damages for emotional distress were available for the union's breach of its duty of fair representation. Damages for emotional distress were also allowed under Section 301 in *UAW v. Federal Forge,* 583 F.Supp. 1350 (W.D. Mich. 1984). By analogy to the LMRA, compensatory damages should be allowed under ERISA where outrageous or malicious conduct has caused emotional distress.

Petitioners also contend that general and punitive damages are barred by Title VII and by analogy should be barred under ERISA. The courts have disagreed as to whether general and punitive damages are allowed under Title VII.

The legislative history of Title VII makes it clear that one of the purposes of Title VII was to make persons whole for injuries suffered as a result of unlawful discrimination. The courts are given wide discretion to grant relief to restore the person as far as possible to the position where he would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972). *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418-420, 45

L.Ed. 2d 280, 95 S.Ct. 2362 (1975). Compensatory damages were allowed in *Tidwell v. American Oil Co.,* 332 F.Supp. 424 (Utah 1971), *Rosen v. Public Service Electric and Gas Co.,* 477 F.2d 90 (3rd Cir. 1973), and *Williams v. Trans World Airlines,* 600 F.2d 1267 (8th Cir. 1981).

The court ruled in *Scott v. Bradley,* 455 F.Supp 672, 673 (E.D. Vir. 1978) and *Spence v. Staras,* 507 F.2d 554, 558 (7th Cir. 1974) that punitive damages may be awarded under the Civil Rights statutes under certain aggravating circumstances. In *Kyriazi v. Western Electric Co.,* 476 F. Supp. 335, 340 (D.N.J. 1979), the court awarded punitive damages against the individual defendants to punish them and to deter future wrongdoing. See also *Claiborne v. Illinois Central Railroad,* 401 F.Supp. 1022 (E.D. La. 1975), *Tooles v. Kellogg Co.,* 336 F.Supp. 14 (D. Neb. 1972), *Developments in the Law—Title VII,* 84 Harv. L. Rev. 1109, 1262 (1971).

The Supreme Court recently held in *Smith v. Wade,* 461 U.S. 30, 75 L.Ed. 2d 632, 637, 103 S.Ct. 1675 (1983) that punitive damages are available under Section 1983, which gives a species of tort liability in favor of persons deprived of civil rights. The court noted that there was little in the legislative history concerning the damages recoverable for this tort liability and so it looked to the common law of torts with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute.

Furthermore, like the LMRA, Title VII does not bar state remedies unless they directly conflict with Title VII. 42 U.S.C. Section 2000e (7). *Hays v. Potlatch Forests, Inc.,* 465 F.2d 1081 (8th Cir. 1972). The Seventh Circuit held in *Spence v. Staras, supra,* 558, that both federal and

state rules on damages may be utilized in civil rights actions, whichever better serves the policies expressed in the federal statutes. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-9, (1974), the Supreme Court stated:

> Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to *supplement,* rather than supplant, existing laws and institutions relating to employment discrimination [emphasis added].

See also *Johnson v. Railway Express Agency,* 421 U.S. 454, 459, 44 L.Ed. 2d 295, 95 S.Ct. 1716 (1975).

Thus, if ERISA were patterned after Title VII and the LMRA, it would appear that ERISA was designed to supplement existing state and common law remedies rather than to bar them. Further, by analogy to Title VII and the LMRA, compensatory and punitive damages could be available under ERISA in appropriate circumstances.

Petitioners also argue that punitive and compensatory damages should not be available under ERISA by analogy to the ADEA. Punitive damages are not allowed under the ADEA, but the ADEA allows liquidated damages to provide full compensatory relief and to deter willful violations. *Dean v. American Security Insurance Co.,* 559 F.2d 1036, 1040 (5th Cir. 1977), *Pfiefer v. Essex Wire Corp.,* 682 F.2d 684, 687 (7th Cir. 1982). Title 29 U.S.C. Section 626(b) empowers the courts to grant such legal and equitable relief as may be appropriate to effectuate the purposes of the ADEA.

Many courts have held that compensatory damages are available under the ADEA in certain circumstances to

realize the purpose of the act. *Combes v. Griffin Television, Inc.,* 421 F.Supp. 841, 847 (N.D. Okl. 1976), *Coates v. National Cash Register Co.,* 433 F.Supp. 655, 664 (W.D. Vir. 1977). The district court noted in *Bertrand v. Orkin Exterminating Co.,* 432 F.Supp. 952, 956 (N.D. Ill. 1977) that Congress afforded plaintiffs a wide arsenal of remedies for the diverse injuries that may result from discrimination.

Unlike the LMRA and Title VII, ERISA preempts state remedies under which punitive and compensatory damages could be available. Unlike the ADEA, ERISA does not provide for liquidated damages. It would be anomalous for Congress to "occupy the field" with respect to the interest of participants and beneficiaries under pension and benefit plan without providing federal protections and remedies to replace those barred.

In its opinion, the Ninth Circuit compared ERISA to the Landrum-Griffin Act, the Labor Management and Disclosure Act (L.M.R.D.A.), (29 U.S.C. Section 411 and 412). ERISA and the LMRDA are similar in that the principle objective of both is to safeguard the rights of workers against the abuses or excesses of the institutions that exist to serve them. Like ERISA, the LMRDA is remedial legislation which should be liberally construed to effectuate its purposes. The right to recover punitive and compensatory damages has often been upheld in cases under the LMRDA. *International B'd of Boilermakers v. Braswell,* 388 F.2d 193, 199-201 (5th Cir.) *cert den* 391 U.S. 935, 88 S.Ct. 1848, 20 L.Ed. 2d 854 (1968), *Simmons v. Avisco,* 350 F.2d 1012, 1018-20 (4th Cir. 1965). In *Cooke v. Orange Belt Dist. Council of Painters,* 529 F.2d 815, 820 (9th Cir. 1976), the Ninth Circuit held that puni-

tive damages might be awarded under appropriate circumstances to serve as a deterrent to those abuses which Congress sought to prevent. In *Bise v. International Bro. of Electrical Wrkrs.,* 618 F.2d 1299 (9th Cir. 1979), the court allowed compensatory damages for emotional distress as well as punitive damages. By analogy to the LMRDA, compensatory and punitive damages should be allowed in ERISA cases.

The court stated in *Landro v. Glendenning Motorways, Inc.,* 625 F.2d 1344, 1351, 1356 (8th Cir. 1980), that ERISA is remedial legislation which should be construed liberally in favor of those persons it was meant to benefit and protect, namely participants in and beneficiaries under covered pension and welfare plans. In light of the legislative policy behind ERISA, the opinion of the Ninth Circuit with regard to punitive and extra-contractual damages should be affirmed.

5. It would be appropriate to award compensatory and puntive damages in this case.

Petitioners lead the court to believe that the action herein is a simple and routine dispute involving denied employee benefits governed by ERISA. Petitioners contend that because Respondent Doris Russell availed herself of ERISA appeal procedures, recovered back benefits and was reinstated to employment, she should not be able to recover any damages for the actions of the fiduciaries in terminating her benefits and her employment.

Petitioners suggest that the only errors made by the fiduciaries were a good faith mistake as to her entitlement to disability benefits, and a brief delay in providing a decision on Respondent's appeal. In fact, the fiduciaries

breached their duties under ERISA repeatedly in their handling of her claim and her appeal.

The fiduciaries of the self-funded plan are long-time high-ranking employees of the company, and thus are in a conflict of interest position. They breached their duties under ERISA in the following ways:

Failing to review past medical records of Respondent although she had requested the fiduciaries to do so on more than one occasion (Section 1104(a)(1)(B);

Incorrectly applying the stricter standards of a totally different benefit plan to the detriment of Respondent and to the direct benefit of the company (Section 1104 (a)(1)(B) & (D));

Ignoring medical evidence submitted by Respondent's doctors and requiring unauthorized independent medical examinations (Section 1104(a)(1)(B) and (D));

Failing to process Respondent's claim in a timely manner, taking more than twice as long as the 60-day review procedure set forth in ERISA (Section 2560.503 (g) and (h));

Terminating Respondent's employment in order to avoid paying her additional benefits (Section 1140); and,

Generally acting in the best interests of the company and in wanton indifference to the interests of Respondent. Section 1104(a)(1) (A) (i) and Section 1106(b)).

The court should be aware that discovery was not yet completed when summary judgment was granted by the District Court on all causes of action. Thus, it is likely that additional breaches of fiduciary duty will be added to the above list.

Clearly all of these violations of ERISA's provisions and its policy constitute more than a good faith error, but rather are evidence of bad faith and self-interest. As a result of these breaches of fiduciary duty, Respondent was damaged economically and suffered severe emotional distress accompanied by physical illness. The sufferance of this type of economic and emotional harm simply cannot be excused or overlooked simply because a retroactive decision was made to provide benefits.

It would be appropriate in this case to award Respondent damages to compensate her for her economic loss and her emotional distress. Punitive damages would also be appropriate to deter the fiduciaries and others in a similar position from making a pattern and practice of acting in bad faith and in total disregard for the rights of participants under ERISA.

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C. CONCLUSION

The opinion of the Ninth Circuit herein held that compensatory damages are available against a fiduciary under ERISA to remedy the wrong and make an aggrieved claimant whole where there has been a breach of fiduciary duty. The Ninth Circuit held that punitive damages are also available in very limited circumstances where there is evidence of malice, wanton indifference or other outrageous conduct on the part of the fiduciary. This is a well-reasoned opinion based upon a careful and detailed analysis of the stated policy of ERISA, the legislative history and the decisions of various circuits.

Petitioners attempt to make the decision appear reckless, poorly reasoned, and in conflict with the policy of ERISA and the majority of the case authority. Through their phrasing of the question presented for review and their misleading emphasis upon the facts of this case, Petitioners attempt to convince the Supreme Court that the Ninth Circuit has opened the door to a flood of trivial and frivolous litigation which will endanger the stability of ERISA plans and overburden the courts. Respondent has shown that this characterization of the decision of the Ninth Circuit is incorrect.

The decision of the Ninth Circuit is in harmony with the primary purpose of ERISA which is to protect the interests of participants and to provide broad remedies for redressing or preventing violations of the act. Respondent Russell respectfully prays that the opinion of the Ninth Circuit be affirmed.

Dated: December 18, 1984

Respectfully submitted,

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No. 84-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In their brief, petitioners demonstrated that the Ninth Circuit erred in holding that the extraordinary remedy of punitive damages was available to plan participants and beneficiaries for fiduciary breach under ERISA. Punitive damages, of course, "are not presumed; they are not the norm; and nowhere in ERISA are they mentioned." *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). Nor are they mentioned anywhere in ERISA's extensive legislative history. Moreover, ERISA's comprehensive statutory scheme, which includes detailed enforcement provisions, effectively refutes any suggestion that Congress intended

punitive damages to be available. Finally, the decidedly adverse impact that punitive damages would have on the proper functioning of the employee benefit plan system and the federal courts provides further evidence that Congress intended to exclude punitive damages from ERISA's comprehensive regulatory framework. For essentially the same reasons, the Ninth Circuit's ruling that extra-contractual compensatory damages are available under ERISA should be reversed.

In response, respondent Russell concedes that punitive and extra-contractual damages are nowhere mentioned in ERISA or its legislative history. Indeed, beyond a single sentence referring to the "full range of legal and equitable remedies," which appears at several places in the legislative reports, she points to no support whatsoever in the legislative history for her position.[1] Rather, emphasizing that ERISA is a remedial statute designed to protect the interests of participants and beneficiaries, she argues that Congress intended the federal courts to develop a federal common law to further ERISA's policies and that a private right of action for such damage remedies should be judicially implied or "read into" the statute. Alternatively, she suggests that even if this Court were unwilling to find such remedies generally available under ERISA, it should rewrite the statute to include a special private right of action for participants and beneficiaries of single employer plans that are self-

[1] As demonstrated in petitioners' brief, respondent's reliance on this stateement is misplaced. This statement had its genesis in an earlier version of ERISA which expressly provided a civil action for "legal or equitable" relief to redress breaches of fiduciary duty. *See* S. 4, Section 603, 93d Cong., 1st Sess. (Apr. 18, 1973), *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Subcommittee on Labor, Committee on Labor and Public Welfare, United States Senate (April 1976) ("Legislative History") at 579. Ultimately, Congress eliminated all references to "legal" relief, choosing instead to rely solely on equitable remedies. *See* ERISA Section 502, 29 U.S.C. § 1132 (1982).

administered. As demonstrated herein, these contentions cannot withstand close scrutiny.

I. ERISA'S REMEDIAL PURPOSE DOES NOT SUPPORT THE IMPLICATION OF ADDITIONAL REMEDIES UNDER THE STATUTE

Respondent's reliance upon ERISA's remedial purpose to support the implication of additional remedies is wholly misplaced. To be sure, ERISA was designed to protect the interests of plan participants and beneficiaries, and, indeed, the Act's "primary purpose" was the "protection of individual pension rights." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* Legislative History at 2348. However, in fashioning its comprehensive reform of the employee benefit plan system, Congress also recognized that such plans required private, voluntary action and that large increases in the cost of maintaining such programs would discourage their continuation and growth. Thus, rather than merely extending protections to participants and beneficiaries, Congress resolved these competing interests in order to craft "a private insurance system that would operate efficiently, thereby increasing its acceptance and institution among American business." *Taylor v. Bakery & Confectionary Union*, 455 F. Supp. 815, 820 (E.D.N.C. 1978).

That Congress sought to minimize the costs to employers of the reforms in the Act is clearly reflected in ERISA's legislative history. As noted by the House Committee on Education and Labor in reporting the Bill:

> [T]he Committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, *all of the provisions in the Act have been analysed on the basis of their projected*

costs in relation to the anticipated benefit to the employee participant.

H.R. Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* Legislative History at 2348 (emphasis added). This purpose to place reasonable limits on the costs and administrative burdens faced by employers in implementing ERISA's reforms was repeatedly emphasized in floor debates on the Bill. As noted by Senator Nelson:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

102 Cong. Rec. S15762 (daily ed. Aug. 22, 1974).[2]

The balance struck by Congress in its comprehensive reform of the entire employee benefit system simply makes no provision for the supplemental remedies which the Ninth Circuit decision would make available. Indeed, punitive or extra-contractual damages are nowhere mentioned either in ERISA or its extensive legislative history, much less analyzed on the basis of "their projected costs in relation to the anticipated benefit to the employee participant." Moreover, as demonstrated in petitioners' brief, their availability not only could deter employers from establishing employee benefit plans, but also would lead to substantial increases in the costs of maintaining such programs by, among other things, effectively negating the operation of the internal appeals procedures which Congress mandated. In view of Congress' sensitivity to unnecessary costs and its desire to encourage expansion of voluntary employee benefit plans, it is inconceivable that Congress "absent-mindedly forgot to mention an intended private action" for such remedies.[3] *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S., 11, 20 (1979).

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[2] *See also* 102 Cong. Rec. S15,753-754 (daily ed. Aug. 22, 1974) ("We know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would hurt rather than help the employees for whose benefit the legislation is designed. So it is no accident that the additional costs of the new requirements are generally very moderate") (Statement of Senator Long); 102 Cong. Rec. H1149 (daily ed. Feb. 26, 1974) ("[S]ince these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer") (Statement of Representative Ullman); 102 Cong. Rec. H1160 (daily ed. Feb. 26, 1974) ("Each regulation has to be weighed against the burdens and pressures it imposes on the system. Each requirement has to be weighed against the cost increase which might result") (Statement of Representative Perkins); 102 Cong. Rec. H1168 (daily ed. Feb. 26, 1974) ("[Congress'] primary concern was in tightening the existing standards for qualified plans while at the same time continuing to encourage voluntary participation in such plans. As a result, the Committee found it necessary to strike a very delicate balance between what we felt companies with pension plans should do and what they were willing to do, since no employer can be compelled to offer any plan at all.") (Statement of Representative Rostenkowski).

[3] This conclusion is buttressed by the fact that around the time of ERISA's passage in 1974, Congress expressly included punitive damages provisions in some 11 different federal statutes. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978 § 1117(a), 12 U.S.C. § 3417 (1982); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 88 U.S.C. § 2520 (1982); Tax Equity and Fiscal Responsibility Act of 1982 § 357(a)(c), 26 U.S.C. § 7431(a)(c)(1982); Deepwater Port Act of 1974 § 15(c), 33 U.S.C. § 8814(c) (1982); Civil Rights Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1982); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 107(c)(3), 42 U.S.C. § 8607(c)(3) (1982); Railroad Revitalization and Regulatory Reform Act of 1976 § 511(j), 45 U.S.C. § 831(j) (1982); Natural Gas

II. FEDERAL COMMON LAW CANNOT SUPPLY SUPPLEMENTAL REMEDIES IN ERISA NOT AUTHORIZED BY CONGRESS

Contrary to respondent's suggestion, this Court does not have common law authority to fashion all "necessary and appropriate remedies" under ERISA. There is, of course, "no general federal common law." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (*quoting Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Rather, the federal judiciary's authority to fashion federal common law is "subject to the paramount authority of Congress." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981) (*quoting New Jersey v. New York*, 283 U.S. 336, 348 (1931)). As a result, except in areas of "uniquely federal interests" not here involved,[4] "federal common law [only] . . . may come into play when Congress has vested jurisdiction in the federal courts and *empowered them to create governing rules of law*." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 642 (emphasis added). Moreover, the fact that Congress evidences an intent to permit the courts to fashion federal common law to fill in the interstices of certain provisions of a statute does not similarly suggest "that Congress intended courts to have the power to alter or supplement the remedies enacted." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 645.

Pipeline Safety Act of 1968 § 12(a), 49 U.S.C. § 1679(a) (1982); Transportation Safety Act of 1974 § 111(a), 49 U.S.C. § 1810(a) (1982); Pipeline Safety Act of 1979 § 209(a), 49 U.S.C. § 2008(a) (1982); and Foreign Intelligence Surveillance Act of 1978 § 110, 50 U.S.C. § 1810 (1982).

[4] Such "uniquely federal interests" include "the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations and admiralty cases." Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. at 641. They do not include adjudication of private suits involving the rights and obligations of private parties, even though a federal interest in the enforcement of the underlying statutory scheme may be present. *Id.* at 641.

This rule is well illustrated in this case. Here, Congress may well have intended federal common law to be fashioned "to deal with the issues involving rights and obligations under private welfare and pension plans." 102 Cong Rec. S15751 (daily ed. August 22, 1974) (Statement of Senator Javits). ERISA itself largely leaves unregulated the substantive provisions of employee benefit plans. *See generally In re White Farm Equipment Company*, Civil Action No. C82-3209 (N.D. Ohio Sept. 20, 1984).

In contrast, the remedies available under ERISA for fiduciary breach are both detailed and specific. Such specificity "suggests a sharp distinction between the lawmaking powers conferred in defining violations [of the statute] and the ability to fashion the relief available to parties claiming injury." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 644. Thus, whatever latitude the courts may have with respect to other provisions of ERISA, "[i]t does not necessarily follow . . . that Congress intended to give courts as wide discretion in formulating remedies . . . ." *Id.* at 643. Moreover, as this Court has recognized:

> The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement . . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.

Northwest Airlines, Inc. v. Transport Workers, 451 U.S. at 97 (citations omitted). For just these reasons, this Court refused to create additional remedies beyond those provided under the statutes involved in *Northwest Airlines, Inc. v. Transport Workers, supra,*[5] and *Texas In-*

dustries, Inc. v. Radcliff Materials, Inc., supra, under the rubric of federal law. Congress' similar detail with respect to the remedies available under ERISA mandates the same conclusion.

Nor does Congress' failure to provide the remedies allegedly available for fiduciary breach under state law require a different result. The adoption of state law remedies in the manner proposed by respondent would virtually nullify Congress' intention to establish a "uniform source of law for evaluating fiduciary conduct" in ERISA.[6] *See* Introductory Statement of Senator Javits on S. 1557, *reprinted in* Legislative History at 279. The need for such uniformity was particularly acute because of the conflicting or inconsistent state regulation which previously had characterized the employee benefit plan area. As the House Report stated:

> [A] fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area *where decisions under the same set of facts may vary from state to state* . . . . [I]t is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions *without the necessity of reference to varying state laws.*

[5] Indeed, the "equitable or remedial relief" language of Section 409, upon which the Ninth Circuit relied for its holding, is virtually identical to Title VII of the Civil Rights Act of 1964, which was the subject of a similar effort to imply supplemental remedies under federal common law in Northwest Airlines v. Transport Workers, *supra*. In that case, this Court concluded that Title VII constituted a comprehensive legislative scheme for which supplemental remedies could not permissibly be implied. *See also* Texas Industries, Inc. v. Radcliff Materials, Inc., *supra* (no additional remedies provided under antitrust laws).

[6] The need to establish "standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans" was identified by Congress as one of ERISA's principal objectives in the Act's Findings and Declaration of Policy. ERISA Section 2; 29 U.S.C. § 1001(b) (1982).

H.R. Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* Legislative History at 2359 (emphasis added). Accordingly, Congress preempted, with rare exceptions, *all* state laws which relate in any manner to employee benefit plans.[7] ERISA Section 514; 29 U.S.C. § 1144 (1982). Respondent's suggestion that Congress nonetheless intended the federal courts to imply any state remedy which Congress itself had preempted would foster the very uncertainty of decision that Congress hoped to eliminate.[8]

[7] As Senator Javits stated: "the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs." 102 Cong. Rec. S15751 (daily ed. Aug. 22, 1974); *see* Shaw v. Delta Air Lines, Inc., 103 S.Ct. 2890, 2901 (1983).

[8] Furthermore, although respondent would have this Court believe that the application of punitive damages remedies in the various states is uniform, the circumstances under which such remedies may be awarded vary greatly from state to state. The states have developed a variety of ad hoc tests designed to determine both the entitlement to and the amount of punitive damages, and there is little consistency in these standards. *See* Smith v. Wade, 460 U.S. 30, 60-64 (1983) (Rehnquist, J., dissenting); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 So. Cal. L. Rev. 1, 34-37 (1982). Indeed, while California state courts appear to be fairly liberal in awarding such remedies, at least four states prohibit common law punitive damages awards altogether as a matter of public policy. *See* Killebrew v. Abbott Laboratories, 359 So. 2d 1275 (La. 1978); USM Corp. v. Maison Fastener Corp., 392 Mass. 334, 467 N.E.2d 1271 (1984); Miller v. Kinsley, 194 Neb. 123, 230 N.W.2d 472 (1975); Barr v. Intercity Citizens Bank of Tampa, 96 Wn. 2d 409, 635 P.2d 441 (1981). Congress obviously determined that such arbitrary and unpredictable enforcement was inconsistent with its objective to establish uniform application of ERISA's fiduciary principles.

III. THIS COURT SHOULD NOT IMPLY ADDITIONAL REMEDIES UNDER ERISA PURSUANT TO *CORT v. ASH* STANDARDS

Respondent's alternative contention that this Court should resort to *Cort v. Ash*, 422 U.S. 66 (1975), standards and imply a private right of action for participants and beneficiaries to recover punitive and extra-contractual damages under Section 409 also is without merit.[9] The question whether to imply a private cause of action, of course, turns on congressional intent. "[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. at 94. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981).

In this case, any suggestion that Congress intended to provide such an implied right of action to plan participants and beneficiaries is belied by the statute itself. As noted in connection with respondent's federal common law argument, ERISA already includes comprehensive and specific enforcement provisions which set forth the remedies Congress deemed appropriate for fiduciary breach. Those same provisions extend participants and beneficiaries the right to bring an action for "appropriate relief under § 409", but do not make punitive or extra-

[9] Respondent refuses to concede that the plain language of Section 409 authorizes relief solely on behalf of the plan itself, and not individual participants or beneficiaries. Nonetheless, Respondent can point to nothing in ERISA itself or its legislative history to refute the overwhelming evidence that Section 409 makes relief available only to plans as a whole for breaches of fiduciary duty in the management or investment of plan assets. *See* Petitioners' Brief at 11-16. Respondent thus concentrates her efforts primarily on arguing that such a cause of action should be implied under Section 409.

contractual damages available to them. Moreover respondent can point to no support in ERISA's legislative history for the implication of such additional remedies beyond the statute's general purpose of protecting plan participants and beneficiaries, a factor which, without more, "does not require the implication of a private cause of action for damages on their behalf." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979). Accordingly, since "neither the statute nor the legislative history reveals a congressional intent to create a private right of action . . . [this Court] need not carry the *Cort v. Ash* inquiry further." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. at 94 n.31.

IV. THIS COURT SHOULD NOT REWRITE ERISA TO PROVIDE SPECIAL REMEDIES FOR SINGLE EMPLOYER PLANS

Respondent's brief argues that beneficiaries of self-administered single employer plans lack protections comparable to those found in Taft-Hartley plans and insurance funded plans. For this reason, respondent asserts that the courts should fashion special remedies to protect participants and beneficiaries of single employer plans that would not apply to the other two types of employee benefit plans. This suggestion, which amounts to little more than an invitation to rewrite ERISA, cannot withstand critical scrutiny.

Although insurance funded plans may be subject to additional regulation beyond ERISA's fiduciary and enforcement provisions, such protections are a direct result of Congress' decision to exempt state insurance law from the scope of ERISA's preemption provision. *See* ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). Thus, Congress determined that insurance companies which fund or serve as professional administrators of an employee benefit plan would remain subject to whatever

additional regulation might be imposed by the insurance laws of the several states. In contrast, ERISA's preemption provision contains no similar exception subjecting fiduciaries of single-employer plans to the vagaries of state law.[10]

Nor did Congress draw any distinction between fiduciaries of single-employer and Taft-Hartley plans in fashioning ERISA's fiduciary standards and enforcement provisions.[11] Obviously, Congress was aware that many employee benefit plans would be administered by employers themselves, rather than third parties. Nonetheless, it detected in such arrangements no inherent "conflict of interest" requiring special protections beyond those provided in the statute.[12] Indeed, Congress expressly provided that an individual could serve "as a fiduciary in addition to being an officer, employee, agent, or other

[10] Indeed, if anything, Congress' refusal to preempt state insurance law underscores the impropriety of subjecting ERISA fiduciaries to the state common law remedies advocated by Respondent. Obviously, if Congress had intended to leave such remedies intact, it knew how to do so by exempting them from the scope of ERISA's preemption.

[11] Fiduciaries of single-employer funded employee benefit plans have not, as respondent contends, been held to a higher standard of duty in processing benefit claims that Taft-Hartley trustees. The courts have consistently employed an "arbitrary and capricious" standard in reviewing the propriety of a fiduciary's decision to deny benefits to particular claimants, not only for multiemployer funds, but for single-employer and insurance funded plans as well. *See, e.g.*, Offutt v. Prudential Insurance Co., 735 F.2d 948, 950 (5th Cir. 1984); Wolfe v. J.C. Penney Co., Inc., 710 F.2d 388, 393 (7th Cir. 1983); Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2d Cir.), *cert. denied*, 459 U.S. 1039 (1982); Paris v. Profit Sharing Plan, 637 F.2d 357, 362 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981).

[12] Congress relied instead on the fact that ERISA codified the strict fiduciary standards of trust law for all trusts and that "the fiduciary requirements of ERISA specifically insulate the trust from the employer's interest." NLRB v. Amax Coal Co., 453 U.S. 322, 333 (1981).

representative of a party in interest" (such as an employer), without violating ERISA's conflict of interest provisions contained in Section 406, 29 U.S.C. § 1106 (1982). *See* ERISA Section 408(c)(3), 29 U.S.C. § 1108 (c)(3) (1982). And Congress provided that all employee benefit plans establish internal claims procedures. *See* ERISA Section 503; 29 U.S.C. § 1133 (1982). Thus, even if the presence of union representatives in the administration of Taft-Hartley plans did provide an additional measure of protection to plan participants and beneficiaries—a proposition not entirely free from doubt[13]—there is no basis in ERISA's plain language or legislative history for subjecting fiduciaries of single-employer plans to a differing scope of liability. In any event, if such additional remedies, in fact, were needed in this area, it would remain a question for the Congress, rather than the courts, to decide.[14] *See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 647; *Northwest Air-*

[13] The Taft-Hartley Act, of course, required *employer* representation in the management of employee benefit funds subject to its jurisdiction in order to protect against perceived abuses of such funds by unions. As the Court has noted:

> The requirement that employer and employee be equally represented among the trustees of an employee benefit fund prevents any misuse of those funds by union officers who would otherwise have sole control of vast amounts of money contributed by the employer. The management-appointed trustee "represents" the employer only in the sense that he ensures the union-appointed trustee does not abuse his trust with respect to the funds contributed by the employer.

NLRB v. Amax Coal Co., 453 U.S. 322, 330 (1981) (citations omitted.)

[14] Indeed, acceptance of respondent's suggestion would have the inevitable effect of increasing the cost of administering many employee benefit plans in a manner Congress could not have intended. Faced with the prospect of unpredictable liability, many employers would forego self-administration in favor of third party professional administrators. Moreover, since ERISA Section 404 specifically permits administrative fees to be paid from assets of the plan, the additional costs of such administration ultimately would be borne by the participants and beneficiaries themselves.

lines, Inc. v. Transport Workers, 451 U.S. at 98; *United States v. Topco Associates*, 405 U.S. 596, 611-612 (1972); *United States v. Gillman*, 347 U.S. 507, 511-513 (1954).

CONCLUSION

ERISA is a "comprehensive and reticulated statute," *Nachman v. PBGC*, 446 U.S. 359, 361-62 (1980), designed to provide uniform law for regulating employee benefit plans. Consistent fiduciary standards and enforcement provisions are crucial to this goal. Far from immunizing fiduciaries from liability for misconduct, ERISA subjects them to a wide range of stringent statutory remedies including personal liability for breach of fiduciary duty and civil and criminal sanctions. That Congress chose not to include punitive and compensatory damages is evident from its failure to even mention these remedies in the statute or its extensive legislative history and from the specific detailed enforcement remedies it did provide. In arguing that such additional remedies should be implied, respondent has suggested little more than broad policy arguments that would be better addressed to the Congress than to this Court.

For these reasons, the Court should reverse the ruling of the Ninth Circuit in this case.

Respectfully submitted,

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